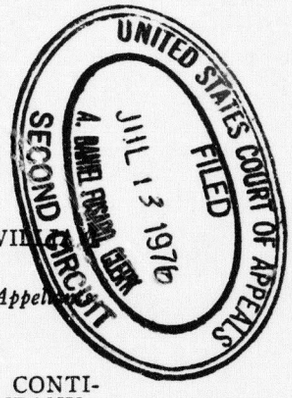
United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

76-7050



United States Court of Appeals

FOR THE SECOND CIRCUIT

MARX & CO., INC., JOHN V. SUMMERLIN, JR., OTTO MARX, JR., WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs-Cross-Appellees,

—against—

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants-Cross-Appellees,

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC.,

Defendants-Appellants,

—against—

WILLIAM D. FUGAZY, LOUIS V. FUGAZY, JOHN V. SUMMERLIN, JR., OTTO MARX, JR., MARX & CO., INC., and F. T. VENTURES, INC.,

Plaintiffs-Appellees

On Appeal from an Order and Judgment of the United States District Court for the Southern District of New York

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APPENDIX TO THE BRIEFS

[Volume I—Pages A-1 to A-512]

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PAGINATION AS IN ORIGINAL COPY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

MARX & CO., INC., JOHN V. SUMMERLIN, JR., OTTO MARX, JR., WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs-Cross-Appellants,

—against—

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants-Cross-Appellees,

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC.,

Defendants-Appellants,

—against—

WILLIAM D. FUGAZY, LOUIS V. FUGAZY, JOHN V. SUMMERLIN, JR., OTTO MARX, JR., MARX & CO., INC., and F. T. VENTURES, INC.,

Plaintiffs-Appellees

On Appeal from an Order and Judgment of the United States District Court for the Southern District of New York

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Docket Entries

72 Civil 4324 Consolidated into this action for ALL PURPOSES

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Ward JUDGE WARD

Jury demand date: by deft: 3-13-73

70 CIV. 3064

D. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
MARX & CO., INC. JOHN V. SUMMERLIN, JR. OTTO MARX, JR. VS THE DINERS' CLUB, INC. DINERS/FUGAZY TRAVEL, INC. THE CONTINENTAL CORPORATION THE CONTINENTAL INSURANCE COMPANY 7/8/71 Added Party: F.T. Ventures, Inc.	For plaintiff: ROBINSON, SILVERMAN, PEARCE, ARONSOHN & SAND 230 Park Ave., NYC, NY - 10017 With Drawn ~~7/7/71 Special Counsel for Pltfs:~~ on 8-5-71 ~~Greenspan, Aufhdl, Davis & Fredericks~~ ~~One North Broadway, White Plains, NY 10601~~ HARRIS & FREDERICKS (Sub. 5-3-74) 1271 Avenue of the Americas N.Y.C 10020 For defendant: ~~Kelley, Drye, Warren, Clark, Carr & Ellis~~ ~~230 Park Ave. NY 10022 752-5600~~ 5/21/71 ~~Skadden, Arps, Slate, Meagher & Flom~~ ~~(as attys. for The Continental Corp. and~~ ~~The Continental Insurance Co.)~~ ~~919 Third Ave. NY 10022 371-6000~~ Friedman, Koven, Shapiro, Salzman, Koenigsbe Specks & Homer. (deft. F.T. Ventures, Inc) 230 Park Avenue. N.Y. (Mu 9-7788) Hardee, Carovick, & Konecky ~~300 Park Ave~~ One Dag Hammarskjold Plaza ~~NY3 10022~~ (for defts) NYC10017 421-1144

STATISTICAL RECORD	COSTS
S. 5 mailed X	Clerk
S. 6 mailed ✓	Marshal
sis of Action:	Docket Fee
S.C. ACT OF 1934	
50,000	Witness fees
tion arose at:	Depositions

DATE	NAME OR RECEIPT NO.	REC.	DISB.
1-16	~~Kelley~~ Rec'd	15 -	
7-12-73	Rec'd		5 -
2/4/76	Hardee	5	
2/6/76	TRANS		5
2/17/76	OLWINE	5 -	
2/19/76	TRANS		5 -

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MARX & CO., INC., ET AL VS THE DINERS CLUB INC., ET AL

~~JUDGE TYLER~~

JUDGE KNAPP 70 CIV. 3064

DATE	PROCEEDINGS	Date Order Judgment N
Jul 16-70	Filed complaint issued summons	
Jul 16-70	Filed notice of assignment	
Jul 31-70	Filed Notice for Discovery and Inspection.	
Aug.4-70	Filed Notice for Discovery and Inspection.	
Aug.7-70	Filed Notice for Discovery and Inspection by Plaintiffs Marx & Co.Inc., John V. Summerlin,Jr. and Otto Marx,Jr. on 9/21/70.	
Aug.7-70	Filed Notice for Discovery and Inspection by Plaintiffs Marx & Co.Inc., John V. Summerlin,Jr. and Otto Marx, Jr. on 9/22/70.	
Aug 12,70	Filed stip and order that time for deft's Diners Club Inc. Diners /Fugazy Travel Inc. Continental Corp. and Continental Insurance Co. to Answer the complaint be extended to 9-7-70 etc. Tyler J.	
ug 21,70	Filed pltff's notice to take deposition deft's as indicated.	
Aug 26,70	Filed pltff's Supplemental Notice of taking depositions as indicated.	
Sept.1-70	Filed stipulation and order adjourning deposition of Otto Marx,Jr. to 9/25/70; further stipulated that deposition of John V. Summerlin,Jr. is adjourned to 9/25/70,etc. So ordered. Tyler, J.	
Sep.3-70	Filed stipulation and order extending defts. The Diners' Club Inc., Diners/Fugazy Travel,Inc., The Continental Corp. and The Continental Ins. Co.'s time to answer complaint to 9/15/70. Soordered. Tyler, J.	
Sept.9-70	Filed Response to Notice for Discovery and Inspection.	
Sept.9-70	Filed Notice to take Deposition.	
Sept.14-70	Filed stipulation and order extending certain defendants time to answer complaint to 9/24/70. So ordered. Tyler, J.	
Sept.21-70	Filed Order to Show Cause re: Comply withdemands RET. 9/25/70 at 2:15 P.M. before Tyler, J.	
Sept.22-70	Filed Amended Complaint.	
ept.17,70	Filed summons with marshal's ret. Served The Diners' Club Inc. by Mr. E. Halue Wise on 7-24-70 Served Diner Fugazy Travel Inc. by Walter Schimpf on 7-22-70 Served Contenental Corp. by Mr. Dan J. O'Sullivan on 8-5-70 Served Contenental Ins. Co. by Mr. Dan J. O'Sullivan on 8-5-70	
Sept.24-70	Filed stipulation and order re: stay all pre-trial proceedings, adjourning all pretrial proceedings until such time as the Court has an opportunity to consider the motion to dismiss complaint presently ret. 10/2/70 before Tyler, J. So ordered. Tyler, J.	
Sept.30-70,	Filed stipulation and order adjourning motion to October 16, 1970,etc. So ordered. Tyler,J.	
Dec.7-70	Filed Reply to Defendants Sur-Reply Affidavit.	
Dec.7-70	Filed Memorandum in opposition to defts'.motion to dismiss.	
Dec.7-70	Filed Memorandum of Law in support of motion.	
Dec.7-70	Filed Reply Memorandum in support of Defts'.motion to dismiss.	
Dec.7-70	Filed Plaintiffs' Reply Brief.	
Dec.7-70	Filed letter addressed to Judge Tyler from Robinson,Silverman,Pearce,Aronsohn & Sand.	
Dec.7-70	Filed Affidavit of Otto Marx, Jr.in opposition to defts'.motion to dismiss.	
Dec.7-70	Filed Sur-Reply Affidavit of Francis S. Bensel.	
Dec.7-70	Filed Memorandum of Law in support of pltfs'.motion to compel inspection of documents.	
Dec.7-70	Filed Affidavit of Service of notice of motion ret. 10/2/70.	
Dec.7-70	Filed Affidavit in opposition to order to show cause.	
Dec.7-70	Filed Notice of Motion re: grant dismissal of amended complaint.	
Dec.7-70	Filed OPINION #37237. Tyler, J. The motion to dismiss is denied in all respects upon condition that plaintiffs serve and file an amended complaint to the extent indicated no later than 12/16/70. Plaintiffs' motion for disclosure and inspection as requested in its notice, as amended, is granted in part and denied in part. To the extent it is denied, it may renewed if defts' good faith compliance should appear in doubt. It is so ordered. (mailed notice).	

continued next page

DATE	PROCEEDINGS	Date Order or Judgment Noted
.17-70	Filed Second Amended Complaint.	
.24-70	Filed Notice of Depositions.	
29,70	Filed stip and order that time of defts' to Answer the amended complaint be extended to 1-8-71 Tyler J.	
,71	Filed pltffs notice to take deposition of defts.	
,71	Filed defts objection to notice to tkae deposition.	
8-71	Filed ANSWER of defendants to second amended complaint.	LDWCC'E
.18-71	Filed Defendants' Request for Production of Documents No. 1	
19,71	Filed pltffs affidavit in opposition to defts' motion for a protective order.	
19,71	Filed Order to Show Cause. Vacate Depositions. Ret. 1-22-71	
19,71	Filed MEMO. END. on Order Cause filed 1-19-71 Motion disposed of as indicated by the court on the record at argument today, So Ordered. Tyler J.	
22,71	Filed stip and order that the examination of Harold E. Johnson, scheduled for -126-71 be adjourned to 1-29-71 Tyler J.	
25,71	Filed defts notice to take deposition of Otto Marx Jr.	
27,71	Filed defts' request for production of documents. No.2	
27,71	Filed defts' request for production of documents. No.3	
.28-71	Filed Amended ANSWER of all defendants.	KDWCC&E
.5-71	Filed stipulation and order adjourning examination before trial of plaintiff. So ordered. Tyler, J.	
.8-71	Filed Order adding F.T.Ventures, Inc. to counterclaims, and that a summons be served upon it withcopy of defendants' amended answer and counterclaims. Tyler, J.(mailed notice).	
b.11-71	Issued additional summons.	
b.17,71	Filed stip and order that the pltffs' time to reply to defts' amended answer is extended to 3-10-71 Tyler J.	
.23-71	Filed Affidavit of Service of additional summons on Robinson,Silverman,Pearce, Aronsohn & Sand by Barry I. Fredericks on 2/16/71.	
r.18-71	Filed Motion to strike Defendants' Amended Answer.	
.18-71	Filed Memorandum in support of motion to strike defts'.Amended Answer.	
r.7-71	Filed stipulation and order adjourning plaintiffs' motion now ret. 4/23/71 to 4/30/71. So ordered. Tyler, J.	
r.12-71	Filed summons with marshal's ret. Served: F.T.Ventures,Inc. by John Sumerlin on 3/17/71.	
r.22-71	Filed stipulation and order adjourning plaintiffs' motion now ret. 4/30/71 to 5/7/71. So ordered. Tyler, J.	
ay 5-71	Filed stipulation and order adjourning pltfs'.motion now ret. 5/7/71 to 5/21/71.; further stipulated that defts. serve their opposing papers on or before Noon on 5/5/71. So ordered. Tyler, J.	
ay 11-71	Filed stipulation and order adjourning plaintiffs' motion ret. 5/21/71 to 6/25/71. So ordered. Tyler,J.	
ay 21-71	Filed consent and order substituting Skadden,Arps,Slate,Meagher & Flom, 919 Third Ave.NY 10022, as attorneys for The Continental Corp. and The Continental Insurance Co., in place and stead of Kelley,Drye,Warren,Clark Carr & Ellis. So ordered. Tyler, J.	
n 4-71	Filed copy of order filed 5/21/71. with notice of entry.	
n 30-71	Filed stipulation and order adjourning plaintiffs' motion now ret.6/25/71 to 7/2/71. So ordered. Tyler, J.	
l 7-71	Filed Memorandum in opposition to Pltfs'.motion to dismiss defts'.counterclaims.	
l 7-71	Filed Defts'.Answering Memorandum of Law.	
l 7-71	Filed Notice of Appearance for Marx & Co. Inc.,John V.Sumerlin,Jr. and Otto Marx.	
l 7-71	Filed MEMO.END. on motion papers filed 3/18/71. The within motion is disposed of as follows: (1) That branch seeking tostrike defts'.affirmative defenses and counterclaims is denied.(2) That branch seeking severance is denied. Tyler, J.	

continued next page

70 Civ. 3064 Marx & Co.Inc.etc. vs. The Diners' Club,Inc., et al

~~JUDGE TYLER~~ 70 Civ. 3

~~JUDGE KNAPP~~

DATE	PROCEEDINGS	Date Order Judgment No
Jul 7-71	Filed Reply Memorandum in support of pltfs'.motion to strike defts'.Amended Answer.	
Jul 9-71	Filed Notice of Examination before Trial. of William Fugazy.	
Jul 12-71	Filed Answer to defendants' counterclaims.	
Jul.29-71	Filed ANSWER by additional deft.	
Aug.5-71	Filed pltff's notice of withdrawal of special counsel.	
Nov.9-71	Filed pltff's & additional deft's interrogs set No.1.	
Nov.9-71	Filed pltff's notice for discovery & inspection.	
Nov.15-71	Filed deft's interrogs to pltff's .	
Dec.28-71	Filed pltff's & additional deft's stip & order that deft's time to answer pltff's interrogs is ext. from 12-8-71 to 2-1-72, etc. So ordered. Tyler,J.	
Jan.27-72	Filed stip & order that deft's time to answer pltff's interrogs is ext. from 2-1-72 to 3-1-72, pltff's time to answer deft's interrogs, is ext. from 2-1-72 to 3-1-72. So ordered. Tyler,J.	
Mar.3-72	Filed stip & order that pltff's time to answer deft's interrogs is ext. from 3-1-72 to 4-3-72. So ordered. Tyler,J.	
Apr.6-72	Filed stip & order that pltff's time to answer with respect to deft's, interrogs is ext. from 4-3-72 to 6-1-72. So ordered. Tyler,J.	
Jun.1-72	Filed stip & order that deft's time to answer pltff's interrogs is ext. from 6-1-72 to 8-1-72, etc. So ordered. Tyler,J.	
Aug16-72	Filed Stip and order that the time for defts' to answer to interrogatories is extended from 8-1-72 to 9-6-72 and that the time for pltffs' to answer interrogatories is extended from 8-1-72 to 9-6-72. TYLER,J.	
Sep 5-72	Filed Stip and Order that defts' time to answer interrogatories is extended from 9-6-72 to 10-6-72 and that pltffs' time to answer interrogatories is extended from 9-6-72 to 10-6-72. TYLER,J.	
Nov 6-72	Filed Stip and Order that the atty for defts be substituted. TYLER,J.	
Dec 7-72	Filed Stip and Order that defts' time to answer is extended to 1-12-73 and that pltffs' time to answer interrogs. of defts is extended to 1-12-73. KNAPP,J.	
Jan10-73	Filed Stip and Order that the time for defts' to answer interrogs. of pltff. is extended to 1-31-73 and that the pltff's time to answer interrogs. of deft is extended to 1-31-73.KNAPP,J.	
Jan15-73	Filed deft's notice to take depositions upon oral examination of plstt on 2-14-73.	
Jan15-73	Filed defts' notice of motion Re: consolidation ret. 1-26-73.	
Jan15-73	Filed defts' memorandum of law insupport of motion for consolidation.	
Jan15-73	Filed defts' notice of motion to bring in third party defts. ret.1-26-73.	
Jan15-73	Filed deft's memorandum in support of motion for 3rd pty deft.	
Jan29-73	Filed Stip and Order that the motion to consolidate this action with 72 Civil 4324 heretofore noticed for 1-26-73 is ajd'd to 3-2-73,etc. KNAPP,J.	
Jan29-73	Filed Stip and Order that the defts' time to answer interrogs. of pltffs and the additional deft on the counterclaims and the request of pltffs and the additional deft onthe counterclaim for discovery of documents is extended from 1-31-73 to 3-1-73 and the pltffs' time to answer interrogs. of defts is extended from 1-31-73 to 3-1-73. KNAPP,J.	
Jan29-73	Filed Stip and Order that the motion of defts for leave to add third-party defts to the within action,heretofore noticed for 1-26-73 is ajd'd to 3-2-73. KNAPP,J.	

-cont'd on next page-

3064 MARX & CO INC. etc. -v- THE DINERS' CLUB,INC. 70 Civ 3064

72 Civil 4324 Consolidated into this action for all purposes

vi

Ward ~~JUDGE KNAPP~~

. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order or Judgment Noted
r5-73	Filed MEMO-END. on notice of motion dtd 1-15-73 re: bring in third-party defts. Motion granted. KNAPP,J. (mn)	
r5-73	Filed MEMO-END. on notice of motion dtd 1-15-73 re: consolidation. Motion granted and the case is assigned 70 Civ 3064. KNAPP,J. (mn)	
r13-73	Filed deft's demand for trial by jury.	
r19-73	Filed Stip and Order that the pltffs' time to answer withrespect to interrogs. propounded by defts in Action No. 1 is extneded to 4-2-73 and that the defts' time to answer with respect to the interro propounded by the request for productinn of documents of pltffs and the additional deft in Action No. 1 is extended to 4-2-73. KNAPP,J.	
pr.4,73	Filed stip and order extending pltfs. time to answer interrogatories until 5/1/73. KNAPP, J.	
pr.12,73	Filed ANSWER to 3rd. pty. comp. by 3rd.pty.defts.	
.18,73	Filed affdvt. of Barry I.Fredericks.	
.26,73	Filed stip and order extending pltfs. time to answer defts(The Diner's Club.) interrogatories until 6/1/73. BAUMAN, J.	
.26,73	Filed defts. Request for production of documents, addressed to pltfs. in Action # 2.	
.26,73	Filed defts. request for production of documents, addressed to pltfs. in Action # 1.	
n4-73	Filed pltffs Marx & Co.Inc.,et al. response to interrogs. of defts.	
I.23-73	Filed pltff's notice to take deposition of A.S. Bloomingdale .	
g.10-73	Filed deft's answers to pltff's & additional deft's interrogs.	
6-73	Filed Stip & Order that thedefts' time to respond to pltffs' interrogs. in this action is extended to 8-17-73. WYATT,J.	
22-73	Filed Stip & Order that theverifications executed individually by Otto Marx,Jr. and John V. Summerlin be filed and made part of the pltffs', Marx & Co., et al. answer to defts-interrogs. heretofore filed in this action. Wyatt,J.	
.23-73	Filed deft's interrogs to William & Louis Fugazy.	
.4-73	Filed stip & order that time of pltff's-third pty,deft's Fugazy to, respond to interrogs is ext. to 12-11-73. Knapp,J.	
.17-73	Filed Identification of documents by pltff. Marx & Co.,etal.	
.15-74	PRE-TRIAL CONFERENCE HELD BEFORE MAGISTRATE GOETTEL.	
.29-74	Filed stip & order that time of deft. Fugazy to serve responses to, interrogs is ext. to 1-28-74. Knapp,J.	
29 74	Filed pltff's response to interrogs.	
20-74	Filed notice of PRE-TRIAL CONFERENCE BEFORE Magistrate Goettel.	
3 74	Filed stip & order that Harris & Fredericks are substituted as attys, for pltff's .So ordered. Knapp,J.	
14-74	Filed ORDER.No further substitution of attys for the aforesaid parties may be made at any time by reason of conflict of interest in their being commonly represented by said attys. KNAPP,J. (mn)	
	~~PRE-TRIAL CONFERENCE HELD BY~~ Mag. Goettel	
4.19-74	~~PRE-TRIAL CONFERENCE HELD BY~~ Mag. Goettel	
4.20-74	~~PRE-TRIAL CONFERENCE HELD BY~~ Mag. Goettel	
4.21-74	~~PRE-TRIAL CONFERENCE HELD BY~~ Mag. Goettel	
4.22-74	~~PRE-TRIAL CONFERENCE HELD BY~~ Mag. Goettel	
4.23-74	~~PRE-TRIAL CONFERENCE HELD BY~~ Mag. Goettel	
4.31-74	~~PRE-TRIAL CONFERENCE HELD BY~~ Mag. Goettel	
.19-74	Filed pltff's(Fugazy) supplemental responses to interrogs.	
e.11-74	PRE-TRIAL CONFERENCE HELD BY Mag. Goettel	
e.18/74	PRE-TRIAL CONFERENCE HELD BY Mag. Goettel	
e.19/74	PRE-TRIAL CONFERENCE HELD BY Mag. Goettel	

(cont'd Page 6)

70 Civ 3064 Marx & Co, etal vs. The Diners Club,etal 70 Civ

P#6

DATE	PROCEEDINGS	Date Order Judgment No
Feb 11-75	PRE-TRIAL CONFERENCE HELD BY Magistrate Gagliel	
Feb 13-75	PRE-TRIAL CONFERENCE HELD BY Mag. Gagliel	
Feb 17-75	PRE-TRIAL CONFERENCE HELD BY Mag. Gagliel	
Feb. 25-75	Filed deft. Diners' Club notice to take deposition of Robert Phillips.	
Mar. 19-75	Mailed notice of reassignment.	
4-2-75	PRE-TRIAL CONFERENCE HELD BY Ward	
Apr 21.75	Filed Pltff's. identification of financial statements.	
Apr 23.75	Filed Defts'. specification of financial statements.	
May 6.75	Filed Defts'. proposed questions for prospective jurors.	
05-06-75	Before Ward, J., jury trial begun.	
05-07-75	Trial continues.	
05-08-75	Trial continues.	
05-12-75	Trial continues.	
05-14-75	Trial continues.	
05-15-75	Trial continues.	
05-19-75	Trial continues.	
05-21-75	Trial continues.	
05-22-75	Trial continues.	
05-23-75	Trial continues.	
05-27-75	Trial continues.	
05-28-75	Trial concluded. Verdict in favor of individual Pltffs.	
05-30-75	Filed Defts'. request to charge.	
05-30-75	Filed Defts'. trial memorandum.	
05-30-75	Filed Defts'. memorandum of law in support of motion for a directed verdict.	
05-30-75	Filed Defts'. supplemental memorandum of law.	
05-30-75	Filed Defts'. supplementary memorandum of law in support of counterclaims.	
05-30-75	Filed Pltffs'. memorandum in opposition to Defts'. motion for a directed verdict.	
05-30-75	Filed Pltffs'. trial memorandum.	
05-30-75	Filed Pltffs'. memorandum with respect to the admissibility of Fugazy Travel Bureau, Inc. -v- Ernst & Ernst, et ano.	
05-30-75	Filed Pltffs'. supplemental requests to charge.	
05-30-75	Filed Pltffs'. requests to charge.	
05-29-75	Filed Pre-trial Order.....Ward,J.	
05-29-75	Filed Statement of ultimate issues in the case.....Ward,J.	
05-29-75	Filed Stip. & Order amending pre-trial order.....Ward,J.	
06-27-75	Filed petition & notice of application ofRobinson, Silverman, Pearce, Aronsohn, Sand & Perman and Specks & Goldberg for counsel fees in the respective amounts $7,954.28 and $22,746.81.	
7-3-75	Filed Transcript of record of proceedings, dated 5-6,7,8,12 1975	
7-3-75	Filed Transcript of record of proceedings, dated 5-14,15,19-21, 1975	
7-3-75	Filed Transcript of record of proceedings, dated 5-22,23,27,28, 1975	
07-08-75	Filed Stip & Order that the motion of Robinson,Silverman Pearce Aronsohn Sand & Berman & Specks & Goldberg to determine the validity of & to enforce liens for attys. fees etc. is adjourned to 8/11/75;* pltffs/ will not enter judgment on the verdict recorered prior to 8/11/75. Carter J.	
7-16-75	Filed Transcript of record of proceedings, dated MAY 27,28 1975	
08-08-75	Filed Deft.Diners' Club affidavit & notice of motion for an orderof Judgment or for new trial.	
08-08-75	Filed Defts. Memorandum of Law.	
08-08-75	Filed Stip & Order that the motion of Robinson,Silverman,et al. to determine the validity of,& to enforce liens of attys. fees etc. is adjourned to 9-3-75. Ward J.	
Aug 12.75	Filed Affidavit by Barry I. Fredericks in opposition to defts. motion for judgment.	

(Continued)

FPI—LK—12-8-63—12M—2945

DATE	PROCEEDINGS	Date Or Judgment
Aug 12,75	Filed Memorandum on behalf of pltffs. in opposition to defts. motion for judgment not withstandin, the verdict or, in the alternative, for a new trial	
08-19-75	Filed Reply affidavit by Joseph J. Santora to the opposition of affidavit of Barry I. Fredericks.	
08-19-75	Filed Reply Memorandum of Defts. The Diners Club Inc. & Diners World Travel Inc. in support of their motion for judgment notwithstanding the verdict & for a new trial.	
08-29-75	Filed Pltffs. Affidavit in opposition to application by Otto Marx Jr.	
09-03-75	Filed reply affidavit of Robinson, Silverman, Pearce, Aronsohn, Sand & Berman in support of application for counsel fees.	
09-03-75	Filed reply affidavit of Specks & Goldberg in support of application for counsel fees.	
09-03-75	Filed Petitioners', memorandum of law in support of application for counsel fees.	
09-23-75	Filed Opinion #43110. The portion of defts. motion which seeks a new trial on their counterclaims is denied;The Court has considered the other arguments which defts. advance & finds defts. contentions to be without merit. Therefore the motions are in all respects denied. Ward J. (mailed notice)	
09-23-75	Filed Memo. End. on motion dtd. 8-8-75. Motion denied in accordance with opinion filed herewith. Ward J,	
09-29-75	Filed Memo. End on motion dtd.6-27-75. Application to determine & enforce the attys. liens of Robinson Silverman Pearce, Aronsohn Sand & Berman, & Specks & Goldberg referred to the Magistrate Goettel as indicated. Ward J.(mailed notice)	
10-1-75	Filed Memorandum on behalf of Pltffs. with respect to the date from which Pre - Verdict Interest should be computed.	
10-6-75	Filed Plaintiffs Notice of Motion and Affidavit, returnable 10/14/75 at 10AM that pre-verdict interest on the Jury's award be computed from 9/1/69.	
10-6-75	Filed Pltff's Memorandum in support of Pltff's motion(re:above)	
10-06-75	Filed Petitioners Notice for production of documents to pltff. on 10-16-75.	
10-10-75	Filed Affidavit in opposition to pltffs. motion for pre-Judgment interest by Joseph J. Santora.	
10-10-75	Filed Memorandum of Law of Deft. Diners in opposition to pltffs. motion for Pre-Judgment Interest.	
10-14-75	Filed Reply Memorandum in support of Pltffs. motion for Pre Verdict Interest on the jury's award computed from 9-1-69.	
10-14-75	Filed Affidavit in support of pltffs. motion for pre Judgment interest by Barry I. Fredericks.	
11-12-75	**Filed Consent Order that the respective liens of Robinson Silverman Pearce Aronsohn Sand & Berman & Specks & Goldberg are hereby determined to be in the amts. of $7,681.14 & $22,746.81 , & attach to any verdict,etc. in favor of Otto Marx,Jr., Marx & Co.,Inc.,John V. Summerlin,Jr. &F.T. Ventures Inc., Etc. & shall not be affected by any settlement between any of the parties as indicated. Ward J.**	
11-25-75	Filed Pltffs' Notice of Entry of Order fld 11-12-75.	
12-17-75	Filed Memo end on Dt of motion fld10-6-75....Motion granted in accordance with Memorandum decision fld herewith....Ward, J.	
12-17-75	FiledMemorandum....Accordingly, the Court holds that pltffs. are entitled to interest on the jury's award computed from 9-2-69 at the rate of 7 1/2% up and at 6% 6 o/o thereafter....Finally, defts seek to recover their costs pur to Rule 54(d),F. R. Civ P. Recognizing that ordinarily pltffs, who recover a judgment, would ,also recover their costs, defts. appeal to the Court's discretion to award them costs....The litigation was protracted, involving numerous claims and counter-claims. Except for the Continental companies, no pty. was completely successful. In light of all the facts and circumstances, Each of the ptys shall bear its own costs....Settle Judgment on notice....Ward, J. [illegible]	

DATE	PROCEEDINGS	Date Or Judgmen
1-6-76	Fld Counter-Judgment #76,015...Ordered...that defts have judgment on pltffs' claim for violation of SEC Act of 1934...with respect to the10-10-67 acquisition of Fugazy Travel Bureau, Inc....that defts have judgment on pltffs' claim for viol. of the SECact of 1934 with respect to the 10-1-68 amends to the employment agreements of pltffsOMarx, Wm D. Fugazy and L. V. [illegible]...that pltffs have judgment against the deft The Diners' Club, Inc.,on pltffs claim that deft. breached its contract to promptly file a registration statement by pltffs. restricted shares of Common Stock of the Diners'Club Inc and to use best efforts to cause said registration statement to become effective such that pltffs recover from the Diners' Club, Inc the Following Amounts(See Judgment)..... .....That pltffs have judgment on each of defts' counterclaims. and that defts the Continental Ins. Co and The Continental Corp have judgment jointly and severally against pltffs O. Marx, Jr., J. V. Summerlin, Marx & Co., Inc., W. D. Fugazy & L. V. Fugazy for said defts' costs in this action and that each of the other Ptys bear itsown costs of this action.....Ward, J.....Judgment Entered 1-6-76. ----Clerk.... [illegible] ent 1-8-76.(also docketed in 72 C 4324)	
1-20-76	Fld Supersedeas Bond#2 04 67 40...in the amtsxx listed on bond to ptys named on bond.----byFiremen's Ins co of Newark N.J.	
2-4-76	Fld Defts' Diners' Club, inc and Diner's/Fugazx Travel Inc Notice of Appeal to USCA from Final Judgment fld 1-6-76....Copies mailed toHarris, Fredericks & Korobkin----Olwine, Connelly, Chase, O'Donnell & Weyher on 2-6-76)also docketed in 72 C 4324)	
2-17-76	Fld Pltff's Notice of Cross Appeal from final judgment 1-6-76...Copies mailed on 2-18-76 to:Olwine,Connelly, Chase, O'Donnell & Weyher and Hardee Barovick & Konecky & Braun.(also docketed in72 C 4324)	
1-21-76	Fld Defts' Notice of Filing of Supersedeas Bond.	
4-15-76	Fld Notice of Certification to USCA on 4-15-76	
4-30-76	Fld Certification of Record to USCA on 4-30-76	
5-25-76	Fld pltff designation of exhibits to USCA.	
6-28-76	Fld 2nd Supplt Notice of Certification to USCA	

4324 Consolidated with 70 Civ 3064 for all purposes.

CIVIL DOCKET
UNITED STATES DISTRICT COURT

[redacted]

Jury demand date:

C. Form No. 106 Rev

Ward J JUDGE WARD 72 CIV. 4324

TITLE OF CASE	ATTORNEYS
WILLIAM D. FUGAZY and LOUIS V. FUGAZY -v- THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION, and THE CONTINENTAL INSURANCE COMPANY.	For plaintiff: ~~Stein and Fredericks~~ ~~1776 Broadway~~ ~~NYC 10019 Tel: 581-5551~~ HARRIS & FREDERICKS 1271 Ave of the Americas NYC 10020 Tel: 247-2620 For defendant: HARDEE, BAROVICK & KONECKY 300 Park Ave, NYC 10022 421-1144

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
S. 5 mailed x	Clerk	10/15/72	Stein + 7.	15 —	15 —
S. 6 mailed ✓	Marshal	10/13/72	657 —		
asis of Action: S.E.C. Act of 34, 15 USC 77aa, et sq.	Docket fee				
39,597.50.	Witness fees				
tion arose at:	Depositions				

J... ...v- ...HE DINERS' CLUB, INC. et al. 72 Civil 4324

PG#2

[redacted]

72 Civ. 432

DATE	PROCEEDINGS	Date Order Judgment N
Oct 12-72	Filed Complaint and issued summons.	
Oct 30-72	Filed Stip and Order that the time for defts to answer is extended to 11-27-72. TYLER,J.	
Nov 6-72	Filed Summons and Entered Marshal's return served on: The Diners' Bluc,Inc. byEW Hor on 10-13-72, Diners/Fugazy Travel,Inc. by Elsie Nessa on 10-19-72, The Continental Corp by Mr. Sulenicult on 10-18-72 & The Continental Insurance Co by Mr. Sullivan on 10-18-72.	
NV 24-72	Filed Stip and Order that the time for defts toanswer the complaint is extended to 1-12-73. TYLER,J.	
Jan4-73	Filed pltff's notice of change of atty, error	
an4-73	Filed pltff's notice of change of firm of atty.	
Jan15-73	Filed defts Diners' Club,Inc.,Diners' World Travel,Inc.,The Continental Corp. and the Continental Insurance Co. ANSWER to the complaint. H,	
Jan15-73	Filed deft's notice to take deposition of Otto Marx,Jr. on 2-14-73.	
Jan15-73	Filed defts' notice of motion RE: consolidation ret. 1-26-73.	
Jan15-73	Filed defts' memorandum of law in support of motion to consolidate.	
Jan29-73	Filed Stip and Order that the motion of defts to consolidate this action 70 Civil 3064 heretofore noticed for 1-26-73 is adj'd to 3-2-73, etc. KNAPP,J.	
Jan29-73	Filed Stip and Order that the time for the additional defts on counterclaims,Marx & Co.,Inc. Otto Marx,Jr. F.T. Ventures,Inc. and John V. Summerlin,Jr. to answer with relation to the answer add counterclaims is extended to 3-1-73. KNAPP,J.	
Feb6-73	Filed Stip and Order that the pltff's time to answer to the defts' counterclaims is extended to 3-1-73. KANPP,J.	
Mar6-73	Filed ANSWER to defts' counterclaims.	
Mar7-73	Filed Answer ofadditional defts Marx & Co.inc., Otto Mar,Jr.,F.T. Venture Inc.,and John V. Summerlin,Jr. to the defts' counterclaims.	
May 10-74	Pre-Trial Conf. held before Mag. Gaettel	
Aug. 19-74	PRE-TRIAL CONFERENCE HELD BY	Mag. Gaettel
Aug. 20-74	PRE-TRIAL CONFERENCE HELD BY	Mag. Gaettel
Aug. 21-74	PRE-TRIAL CONFERENCE HELD BY	Mag. Gaettel
Aug. 22-74	PRE-TRIAL CONFERENCE HELD BY	Mag. Gaettel
Aug. 23-74	PRE-TRIAL CONFERENCE HELD BY	Mag. Gaettel
Oct. 31-74	PRE-TRIAL CONFERENCE HELD BY	Mag. Gaettel
Dec. 11-74	PRE-TRIAL CONFERENCE HELD BY	Mag. Gaettel
Dec. 18-74	PRE-TRIAL CONFERENCE HELD BY	Mag. Gaettel
Dec. 19-74	PRE-TRIAL CONFERENCE HELD BY	Mag. Gaettel
Feb 11-75	PRE-TRIAL CONFERENCE HELD BY	Mag. Gaettel
Feb 13-75	PRE-TRIAL CONFERENCE HELD BY	Mag. Gaettel
Feb. 27-75	PRE-TRIAL CONFERENCE HELD BY	Mag. Gaettel
Mar. 19-75	Mailed notice of reassignment.	
05-06-75	Before Ward,J. jury trial begun.	
05-07-75	Trial continues.	
05-08-75	Trial continues.	
05-12-75	Trial continues.	
05-14-75	Trial continues.	
05-15-75	Trial continues.	
05-19-75	Trial continues.	
05-21-75	Trial continues.	
05-22-75	Trial continues.	
05-23-75	Trial continues.	
05-27-75	Trial continues.	
05-28-75	Trial concluded. Verdict in favor of individual Pltffs.	

(Continued)

William D. Fugazy, et ano. vs. The Diners Club Inc., et al. K

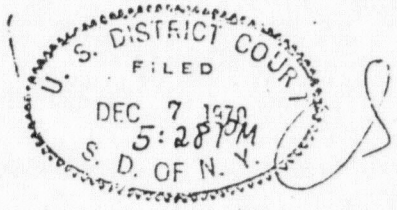
72 Civil 4324 xii 72 Civ 4325

D. C. 110 Rev. Civil Docket Continuation Pg. #3 Ward J.

DATE	PROCEEDINGS	Date Order Judgment No.
09-23-75	Filed Opinion #43110. The portion of defts. motion which seeks a new trial on their counterclaims is denied; The Court has considered the other arguments which defts. advance & finds defts. contentions to be without merit. Therefore the motions are in all respects denied. Ward J. (mailed notice)	
10-14-75	Filed Reply Memorandum in supportof pltffs. motion for Pre Verdict Interest on the jury's award computed from 9-1-69. (Filed in 70 Civil 3064)	
10-14-75	Filed Affidavit in support of pltffs. motion for pre judgment interest by Barry I. Fredericks. (Filed in 70 Civil 3064)	
11-25-75	Filed Pltffs' Notice of Entry of Order fld 11-12-75.	
12-17-75	Filed Memo End on bk of motion fld10-6-75....Motion granted in accordance with Memorandum decision fld herewith....Ward, J. (FILED IN 70CIV 3064	
12-17-75	FiledMemorandum....Accordingly, the Court holds that pltffs. are entitled to interest on the jury's award computed from 9-2-69 at the rate of 7 1/2% up and ~~at 6%~~ 6 o/o thereafter....Finally, defts seek to recover their costs pur to Rule 54(d), F. R. Civ P. Recognizing that ordinarily pltffs, who recover a judgment, would also recover their costs, defts. appeal to the Court's discretion to award them costs....The litigation was protracted, involving numerous claims and counter-claims. Except for the Continental companies, no pty. was completely successful. In light of allthe facts and circumstances. Each of the ptys shall bear its own costs....Seejudgment on notice....Ward, J. mn ~~FILED IN 70-3064~~	
	fld Counter-Judgment. 776,015.....Ordered....that defts have judgment on pltffs' claim for violation of SEC Act of 1934....with respect to the10-10-67 acquisition of Fugazy Travel Bureau, Inc....that defts have judgment on pltffs' claim for viol. of the SECact of 1934 with respect to the 10-1-68 amends to the employment agreements of pltffsOMarx, Wm D. Fugazy and L. V. Fugazy...that pltffs have judgment against the deft The Diners' Club, Inc.,on pltffs claim that deft. breached its contract to promptly file a greistration statement for pltffs. restricted shares of Common Stock of the Diners'Club Inc and to use best efforts to cause said registration statement to become effective such that pltffs recover from the Diners' Club, Inc the Following Amounts(See Judgment).....That pltffs have judgment on each of defts' counterclaims. and that defts the Continental Ins. Co and The Continental Corp have judgment jointly and severally against pltffs O. Marx, Jr., J. V. Summerlin, Marx & Co., Inc., W. D. Fugazy & L. V. Fugazy for said defts' costs in this action and that each of the other Ptys bear itsown costs of this action.....Ward, J.....Judgment Entered 1-6-76. ——Clerk.... mn (FILED IN 70CIV 3064)	
2-4-76	Fld Defts' Diners' Club Inc and Diner's/Fugazy Travel Inc's Notice of Appeal to USCA from Final Judgment ent1- 6-76. Copies mailed to Harris, Fredericks & Korobkin——Olwine, Connelly, Chase, O'Donnell & Weyher on 2-6-76(fld in70Civ324)	
2-17-76	Fld Pltffs' Notice of Cross Appeal from final judgment ent 1-6-76. Copies mailed on 1-8-76 to :Olwine, Connelly, Chase, O'Donnell & Weyher and ~~4-15-76~~ Hardee Barovick Konecky & Braun(Fld in 70 C 3064)	
3-15-76	Fld Notice of Certification to USCA on 4-15-76 (fld in 70 C 3064)	

12/7/70

Filed Dec 7, 1970



Opinion of Judge Tyler

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

MARX & CO., INC., JOHN V. SUMMERLIN, JR. and OTTO MARX, JR.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants.

- -x

OPINION

#37237

70 Civ. 3064 HRT

ROBINSON, SILVERMAN, PEARCE, ARONSOHN & SAND,
New York City, by
BARRY I. FREDERICKS, ESQ.,
Attorneys for Plaintiffs.

KELLY, DRYE, WARREN, CLARK, CARR & ELLIS,
New York City, by
FRANCIS S. BENSEL, RICHARD ALLEN, GERALD M. FREEDMAN, ESQS.

TYLER, D.J.

This lawsuit presents a private claim for damages based on the provisions of 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule X-10b-5 promulgated thereunder. 17 C.F.R. 240.10b-5. This memorandum treats defendants'

10-5-10

motions to dismiss pursuant to Rule 12(b), F.R.Civ.P. and plaintiffs' previously filed motion for an order directing compliance with their notice for discovery and inspection pursuant to Rules 34(b) and 37, F.R.Civ.P. The former are denied subject to partial amendment of the complaint; the latter granted in part and denied in part.

I. Dismissal

Defendants urge three separate grounds for dismissal of the federal claims: (1) failure to state a claim for relief under 10(b) and X-10b-5; (2) failure to plead fraud with particularity in accordance with Rule 9(b), F.R.Civ.P.; and (3) absence of standing to assert the claimed violations on the part of two of the three plaintiffs. As the court noted during oral argument, where the defect is in the pleading, as in grounds (1) and (2), leave to amend pursuant to Rule 15(a) is the appropriate remedy.

Initially, defendants urge that the complaint is insufficient to state a private claim for relief under 10(b) and X-10b-5 because it fails to plead some

form of scienter--at the very least that defendants knowingly made false representations. Although not a model of clear and precise draftsmanship, the relevant portion of the amended complaint, paragraph 11, standing alone, does plead scienter sufficiently to support this action. Heit v. Weitzen, 402 F.2d 909 (2d Cir. 1968), Astor v. Texas Gulf Sulphur Co., 306 F. Supp. 1333 (S.D.N.Y. 1969), cf. Globus v. Law Research Service, Inc., 418 F.2d 1276 (1969).

Read as a whole, paragraph 11 alleges in substance that the four defendants represented that Diners' Club, Inc. (Diners') was to be acquired by Continental Corp. (Continental) or its subsidiary, Continental Insurance Co., increasing Diners' value thereby, while, at the same time, Continental, and its subsidiary, who were controlling stockholders of Diners', acted with a purpose to decrease the value of Diners' stock and defer its acquisition until such time as there had been a substantial decrease in value. With respect to the Continental defendants, the complaint compels the minimal inference of knowledge of the falsity of their representations since they could

hardly be innocent of their own alleged intentionally inconsistent conduct. Similarly, from the close interrelationship between the four defendant corporations, the court can infer that Diners' and Diners/ Fugazy Travel, Inc. (Diners' wholly owned subsidiary) would have been aware of the alleged scheme. Indeed, the allegations strongly suggest that defendants specifically intended to defraud plaintiffs. If it were not for the arguments pressed in counsel's briefs opposing this motion, I would hold the complaint sufficient on its face.

Unfortunately, however, plaintiffs choose to ground their opposition to defendants' motion to dismiss on the sufficiency of a complaint which alleges or implies simply unreasonable or negligent conduct. Contrary to their counsel's assertions, the extent to which traditional scienter requirements of the common law must be pled and proved in a private damage claim under 10b and X-10b-5 is an open question in this circuit. See SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (1968), cert. denied sub nom. Kline v. Securities Exchange Commission, 394 U.S. 976 (1969), Heit v.

Weitzen, supra, SEC v. Great American Industries, 407 F.2d 453, 463 (Kaufman, J. concurring) cert. denied 395 U.S. 920 (1969), Globus v. Law Research Service, Inc., supra, Astor v. Texas Gulf Sulfur Co., supra. Notwithstanding dicta in SEC v. Texas Gulf Sulphur Co., supra, at 855, the majority held only that negligent representation is sufficient to support a claim for injunctive relief under 10(b) and X-10b-5. The limited nature of the holding was reemphasized in Judge Friendly's concurrence, joined in part by other judges. Subsequent decisions cited above, hold only that pleading knowingly false representations minimally supports a private claim for damages. Heit v. Weitzen, Globus v. Law Research Service, Inc., Astor v. Texas Gulf Sulphur, supra. In view of the sufficiency of the amended complaint under the approved standard, it is inappropriate to decide whether liability might be premised upon negligence alone. But, it would likewise be inappropriate to appear to accept the position argued in plaintiffs' memorandum. Under these circumstances, the undersigned deems it wise to require that plaintiffs amend paragraph 11 of their complaint to allege at least knowing misrepresentations by defendants or face reconsideration of this motion to dismiss for failure to state a claim.

Defendants' second ground for dismissal is also a pleading defect, namely failure to comply with Rule 9(b), F.R.Civ.P. which prescribes: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The rule normally requires the pleader to "state the time, place and content of the false representation, the fact misrepresented and what was obtained or given up as a consequence of the fraud." 2A Moore 9.03. Although this language has been often quoted by the courts, reported decisions provide little guidance as each case is decided in light of its own peculiar facts. In my view, this complaint alleges fraud with sufficient specificity under the circumstances to satisfy at least the spirit of Rule 9(b).

It is true that plaintiffs have done no more than reiterate language from section 10b and Rule 10(b)-5 in allegations relating to that conduct engaged in by defendants which was designed to decrease the value of Diners' stock. Nevertheless, the complaint, read as a whole, generally satisfies the purpose of Rule 9(b) in that it informs the adversary of the nature and

object of the fraud claimed. Moreover, some relaxation of the Rule appears necessary in cases like this one where plaintiffs would not be likely to have access to more specific information until after some discovery is permitted. This part of the motion to dismiss is accordingly denied.

Defendants also move to dismiss the claims of Marx & Co. and John Summerlin for lack of standing on the ground that F. T. Ventures, Inc. (Ventures) was both beneficial and record owner of the Diners' shares, transferred to it pursuant to the acquisition of Fugazy Travel Bureau Inc. by Diners'. Defendants assertion of continued ownership of the shares by Ventures is based on the conceded failure of Ventures' attorneys to file with the Secretary of State a certificate of dissolution, which was, in fact, prepared by them, pursuant to a duly approved Plan of Liquidation and Dissolution, N.Y. Bus. Corp. Law §§ 1003, 1004 (McKinney 1963). Plaintiffs urge, on the other hand, that Marx & Co. and Summerlin were distributees of Ventures' assets, the 57,000 Diners' shares in question, that defendants dealt with them as real and

beneficial owners of Diners' shares, that the alleged representations were made to them as individuals and not as directors, officers or shareholders of a corporation which all parties thought to be defunct, and that, therefore, the failure of Ventures to satisfy one formality of dissolution should be disregarded. In my view, plaintiffs' contention have merit and dismissal must be denied. Decision turns upon the legal insubstantiality of the asserted defect, and not upon the scope of the purchaser-seller requirement of 10b and X-10b-5. Cf. Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969), Iroquois Industries Inc. v. Syracuse China Corp., 417 F.2d 963 (2d Cir. 1969), Greenstein v. Paul, 400 F.2d 580 (2d Cir. 1968), Vine v. Beneficial Finance Co., 374 F.2d 627 (2d Cir. 1967), Birnbaum v. Newport Steel, 193 F.2d 461 (2d Cir.) cert. denied 343 U.S. 956 (1952).

If this were a case wherein a corporation was seeking to avail itself of the protection of the corporation laws, the court might be warranted in treating any failure to comply with the pertinent statutes as fatal error. Cf. Stevens v. Episcopal Church History Co., 140 App. Div. 570, 125 N.Y.S. 573 (1910).

This is not such a case, and to treat the conceded technical oversight, from which the moving party suffered absolutely no harm, as a bar to suit does not comport with either common sense or fairness. See Hunn v. United States, 60 F.2d 430 (8th Cir. 1932). Taking plaintiffs representations as true for the purpose of this motion to dismiss, I conclude that Ventures was de facto dissolved and that Marx & Co. and John Summerlin have standing as beneficial owners of Diners' stock to maintain this action.

Since the completion of initially scheduled submissions on this motion, however, the court, at the request of both counsel, has permitted further submissions which appear to relate to whether Ventures did in fact continue to hold and deal in the Diners' shares as a corporation rather than just nominally. Although, to date, parties have not been able to complete their supplemental submissions, it appears virtually certain that the proposed submissions will be neither uncontested nor dispositive of the factual issue regarding plaintiffs' posture in their dealings with defendants. Under the circumstances, partial

summary judgment is inappropriate and it makes little sense to countenance any further unnecessary delay in the progress of this litigation, by awaiting further exhibits. The motion to dismiss is, therefore, denied in all respects, upon condition that plaintiffs serve and file an amended complaint to the extent heretofore indicated no later than December 16, 1970.

II. Discovery

The parties dispute the breadth of discovery required pursuant to four paragraphs of plaintiffs' notice for discovery and inspection. Plaintiffs concede that the notice should be read as amended by their proposed stipulation for production of documents.

The items specifically in contention are the following:

1) With regard to 15 named key personnel of the four corporate defendants, complete records relating to any meetings in the nature of:

   a) expense accounts, travel vouchers and supporting documents (par. 1);

   b) diary and calendar entries and telephone memoranda (par. 2);

c) transportation records (par. 3);

2) With regard to Diners', minutes of all meetings of the Board of Directors, of executive and other corporate committees, annual reports and statements, and proxy statements to stockholders. (par. 35)

Defendants object to these requests as being overboard, contending that only such information as relates specifically to the fraud alleged in the complaint need be produced. As to items (1)(a), (b) and (c), defendants' opposition is based on the expense and burden of retrieving data of that kind; as to item (2), on the revelation of confidential investment information unrelated to plaintiffs' claim.

At this stage, I believe that defendants' contentions in opposition to this motion have merit. From counsel's affidavits, it appears that a good faith attempt to comply with plaintiffs' notice has been made. The broad discovery requested as to items (1)(a), (b) and (c) would seem for the purpose of protecting against concealment of or oversight concerning any communication or meeting of significance to this lawsuit occurring between the officers and directors of the

faith of defendants to date, I do not think that protection of this kind is warranted on the present record. Plaintiffs may have discovery of the information requested concerning meetings among defendants' representatives which relate directly or indirectly to matters in issue in this litigation. It is understood that defendants will make full and fair disclosure of all documents arguably relevant thereto, including documents relating to Messrs. Fugazy, Faunce, and Hays which plaintiffs allege have been withheld.

Similarly, and particularly in view of the more serious interest of defendants in confidentiality as to item 2, plaintiffs' request for minutes of all board, executive and other committee meetings should be limited to those meetings or portions thereof wherein discussion of direct or indirect relevance to the transactions here at issue took place. Since the remaining items requested in paragraph 35 are neither confidential nor difficult to collect, they should be produced.

Plaintiffs' motion for disclosure and

inspection as requested in its notice, as amended, is, therefore, granted in part and denied in part. To the extent it is denied, it may be renewed if defendants' good faith compliance should appear in doubt.

It is so ordered.

Dated: New York, N. Y.
December 7, 1970.

H. R. Tyler, Jr.
U.S.D.J.

1930-19-6

Second Amended Complaint

COPY RECEIVED
Kelley Drye Warren Clark Carr & Ellis
BY
DEC 16 1970

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- -x

MARX & CO., INC., JOHN V. SUMMERLIN, JR. and OTTO MARX, JR.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants.

- -x

ATTYS' FOR

: Judge Tyler

: 70 Civ. 3064

: SECOND AMENDED COMPLAINT

ENTERED

NOW COME plaintiffs, MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR., by their attorneys ROBINSON, SILVERMAN, PEARCE, ARONSOHN & SAND; FRIEDMAN, KOVEN, SHAPIRO, SALZMAN, KOENIGSBERG, SPECKS & HOMER; and PERRY GOLDBERG, and for their Second Amended Complaint against defendants, THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION, and THE CONTINENTAL INSURANCE COMPANY, state as follows:

1. This action arises under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §77aa, for violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder.

2. (a) Plaintiff Marx & Co., Inc. (hereinafter sometimes referred to as "Marx & Co.") is a corporation organized and existing under the laws of the State of New York, which has its principal place of business in the City, County and State of New York.

(b) Plaintiff John V. Summerlin, Jr. (hereinafter sometimes referred to as "Summerlin") is an individual residing in the City, County and State of New York.

(c) Plaintiff Otto Marx, Jr. (hereinafter sometimes referred to as "Marx") is an individual residing in the City, County and State of New York.

3. (a) Defendant The Diners' Club, Inc. (hereinafter sometimes referred to as "Diners") is a corporation organized and existing under the laws of the State of New York, which has its principal place of business in the City, County and State of New York.

(b) Defendant Diners/Fugazy Travel, Inc. (hereinafter sometimes referred to as "DFT") is a corporation organized and existing under the laws of the State of Delaware, which has its principal place of business in the City, County and State of New York. DFT is a wholly-owned subsidiary of Diners.

(c) Defendant The Continental Corporation (hereinafter sometimes referred to as "Continental") is a corporation organized and existing under the laws of the State of New York, which has its principal place of business in the City, County and State of New York.

(d) Defendant The Continental Insurance Company (hereinafter sometimes referred to as "Continental Insurance") is a corporation organized and existing under the laws of the State

of New York, which has its principal place of business in the City, County and State of New York. Continental Insurance is a wholly-owned subsidiary of Continental.

4. During the period from on or about July, 1967 to February 6, 1970, Continental Insurance was in control of Diners and its directors and officers and exercised a controlling influence over the operations, management and policies of Diners and its subsidiaries. As of February 6, 1970, Continental Insurance owned 835,254 shares of Diners' Common Stock, par value $1 per share ("Common Stock"), or 34% of Diners' then outstanding Common Stock. In addition, at that time, Continental Insurance owned $18,750,000 principal amount of Convertible Debentures of Diners, convertible into a total of 424,430 shares of Diners' Common Stock and 100,000 shares of $7 Cumulative Convertible Preferred Stock of Diners, convertible into a total of 650,406 shares of Diners' Common Stock.

5. On or about October 10, 1967, defendant Diners entered into an agreement (the "Purchase Agreement") with Fugazy Travel Bureau, Inc., a New York corporation (the name of which was changed to F T Ventures, Inc. ("Ventures"), a dissolved New York corporation) pursuant to which Fugazy Travel Bureau, Inc., a Delaware corporation, a wholly-owned subsidiary of Defendant Diners (the name of which was changed to Diners/Fugazy Travel, Inc. ("DFT")) acquired, on or about October 30, 1967, substantially all of the assets of Ventures in exchange for 57,000 shares of Diners'

Common Stock. Out of the total of 57,000 shares of Diners' Common Stock so acquired by Ventures, plus 1,710 shares paid with respect thereto in connection with the Diners' 3% stock dividend paid on June 14, 1968, plaintiffs Marx & Co. and Summerlin owned beneficially 23,484 and 5,871 shares, respectively. The closing price of the Diners' Common Stock on the New York Stock Exchange on October 30, 1967 was $36.625 per share.

6. Since October, 1967, the defendant DFT has engaged in the business of providing travel and related services. Defendant DFT's retail travel agency business is conducted primarily through franchises licensed by DFT to use its name and method of doing business.

7. Effective October 30, 1967, plaintiff Marx entered into an employment agreement ("Employment Agreement") with defendant DFT which provided, among other things, for percentage compensation to plaintiff for a maximum period of 15 years at a rate of 20% of the initial franchise fees received by DFT, or 16 2/3% of the net profits of DFT, whichever was greater, subject to a $250,000 per fiscal year limitation and a $2,500,000 aggregate limitation.

8. On or about October 1, 1968, plaintiff Marx received 18,623 shares of Diners' Common Stock in consideration of the elimination of the percentage compensation provisions from the Employment Agreement. The closing price of the Diners' Common Stock on the New York Stock Exchange on October 1, 1968 was $50.00 per share.

9. During the period from in or about July, 1967 to February 6, 1970, defendants unlawfully employed various devices, schemes and artifices to defraud the plaintiffs, made representations of material facts which were untrue and/or engaged in various acts, practices, or a course of business which operated or would operate as a fraud or deceit upon plaintiffs, in connection with the purchase or sale and related transactions with respect to the Diners' Common Stock owned by plaintiffs.

10. The mails and other instrumentalities of interstate commerce were used in connection with the aforesaid unlawful employment of manipulative and deceptive devices.

11. The aforesaid unlawful employment of manipulative and deceptive devices in connection with the purchase or sale and related transactions with respect to the shares of Diners' Common Stock owned by plaintiffs was effectuated by various means and methods including, but not limited to, the following:

(a) At various times prior to October 10, 1967 and from time to time thereafter up to February 6, 1970, defendant Diners represented to plaintiffs that Diners would be acquired by Continental Insurance or Continental and that, as a result thereof, the value of the Diners' Common Stock would be substantially increased;

(b) At various times during the period from October 10, 1967 to February 6, 1970, defendant DFT represented to plaintiffs that Diners would be acquired by Continental Insurance or Continental and that, as a result thereof, the value of the Diners' Common Stock would be substantially increased;

(c) At various times during the period from October 10, 1967 to February 6, 1970, defendant Continental Insurance represented to plaintiffs that Diners would be acquired by Continental Insurance or Continental and that, as a result thereof, the value of the Diners' Common Stock would be substantially increased;

(d) At various times during the period from May, 1968 to February 6, 1970, defendant Continental represented to plaintiffs that Diners would be acquired by Continental or Continental Insurance and that, as a result thereof, the value of Diners' Common Stock would be substantially increased;

(e) At various times during the period from October 10, 1967 to February 6, 1970, defendants Continental Insurance and/or Continental, as controlling stockholders, directly or indirectly,

of defendants Diners and DFT, unlawfully employed various devices, schemes and artifices and unlawfully engaged in a course of business designed to, directed toward and calculated to result in a substantial decrease in the net earnings of defendants Diners and DFT and the value of the Diners' Common Stock

(f) At various times during the period from October 10, 1967, to February 6, 1970, defendant Continental Insurance, as controlling stockholder, directly or indirectly, of defendants Diners and DFT, unlawfully employed various devices, schemes and artifices and unlawfully engaged in a course of business designed to, directed toward and calculated to prevent or defer the acquisition of defendant Diners by defendant Continental Insurance, or defendant Continental, until such time as there had been a substantial decrease in the value of the Diners' Common Stock and thereby increase upon such acquisition the controlling stock position of defendants Continental Insurance and Continental in defendant Diners at the expense and detriment of the plaintiffs.

(g) At various times during the period from May 1968 to February 6, 1970, defendant Continental,

as controlling stockholder, directly or indirectly, of defendants Continental Insurance, Diners and DFT, unlawfully employed various devices, schemes and artifices and unlawfully engaged in a course of business designed to, directed toward and calculated to prevent or defer the acquisition of defendant Diners by defendant Continental Insurance, or defendant Continental, until such time as there had been a substantial decrease in the value of the Diners' Common Stock and thereby increase upon such acquisition the controlling stock position of defendants Continental Insurance and Continental in defendant Diners at the expense and detriment of the plaintiffs.

(h) In Section 10.2(b) of the Purchase Agreement, defendant Diners agreed as follows:

"(b) If Diners shall not have filed any such registration statement subsequent to January 1, 1968 and before January 1, 1969, then, provided there are outstanding more than 25,000 shares bearing legend provided for in Section 10.1(c) hereof, the registered holders thereof (but not less than all of them) may thereafter at any time notify Diners that they desire that Diners file such a registration statement, but only with respect to all such shares then owned by all such holders. Unless Diners shall have received an opinion from its counsel that registration is not required, or if Diners and all such registered holders, together proceeding expeditiously and in good faith after such notice, cannot obtain

from the Securities and Exchange Commission a 'no-action' letter with respect to the sale of such shares, then Diners shall promptly file a registration statement and use its best efforts to cause such registration statement to become effective. Diners may include in such registration statement such other of its securities as it may desire. Anything to the contrary notwithstanding, Diners need not file any such registration statement until it may lawfully use its regularly prepared fiscal year end financial statements as a part of such registration statement. The notifying holders shall pay Diners in advance an amount sufficient to reimburse Diners for one-half of all registration fees, printing costs, auditing fees (but only in excess of normal fees paid by Diners for its fiscal year-end audit), legal fees and all other incidental out-of-pocket expenses incurred in connection with such registration statement."

Pursuant to the foregoing provision of the Purchase Agreement, defendant Diners filed a Registration Statement (Form No. S-1) with the Securities and Exchahge Commission on August 28, 1969, but failed and refused to use its best efforts to cause such Registration Statement to become effective.

12. The aforesaid representations made by the defendants were untrue statements of material fact and were known by the defendants to be false at the time said statements were made. The aforesaid unlawful employment of manipulative and deceptive devices was made and employed by defendants for the purpose of inducing plaintiffs to acquire the shares of Diners' common stock owned by plaintiffs and not to offer said shares for sale during the period from October 10, 1967 to February 6, 1970.

13. On or about December 11, 1969, plaintiff Marx & Co. sold 23,484 shares of Common Stock of Diners at a price of $13.50 per share.

14. Pursuant to defendant Continental's offer dated February 6, 1970, as extended, to purchase Common Stock of Diners at $15.00 per share, plaintiffs Summerlin and Marx sold to Continental 5,871 and 18,623 shares, respectively, of Diners' Common Stock at $15.00 per share.

15. (a) As a direct and proximate result of defendants' unlawful employment of manipulative and deceptive devices, the value of the Diners' Common Stock owned by plaintiff Marx & Co. was reduced significantly to plaintiff's damage in the amount of $900,000.00.

(b) As a direct and proximate result of defendants' unlawful employment of manipulative and deceptive devices, the value of the Diners' Common Stock owned by plaintiff Summerlin was reduced significantly to plaintiff's damage in the amount of $250,000.00.

(c) As a direct and proximate result of defendants' unlawful employment of manipulative and deceptive devices, the value of the Diners' Common Stock owned by plaintiff Marx was reduced significantly to plaintiff's damage in the amount of $700,000.00.

WHEREFORE, plaintiffs pray:

(a) That the Court enter judgment in favor of plaintiff Marx & Co. against the defendants, jointly and severally, in the amount of $900,000.00;

(b) That the Court enter judgment in favor of plaintiff Summerlin against the defendants, jointly and severally, in the amount of $250,000.00;

(c) That the Court enter judgment in favor of plaintiff Marx against the defendants, jointly and severally, in the amount of $700,000.00;

(d) That the defendants pay to the plaintiffs their costs of this action; and

(e) That the plaintiffs have such other, further and different relief as to this Court may appear just and proper.

ROBINSON, SILVERMAN, PEARCE,
ARONSOHN & SAND

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A member of the firm

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Dated Jan 26, 1971

OFFICE K.D.W.C.C.&E. COPY

Defendant's Amended Answer

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR., Plaintiffs, - against - THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY, Defendants. F. T. VENTURES, INC., Additional Defendant on the Counterclaims	Judge Tyler 70 Civ. 3064 AMENDED ANSWER

ENTERED FILED 1/28/71 Diary Register

The above-named defendants by their attorneys Kelley Drye Warren Clark Carr & Ellis answering the second amended complaint (hereinafter "complaint") of the plaintiffs herein:

1. Deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint herein.

2. Deny each and every allegation contained in paragraphs 1, 9, 10, 11, 11(a), (b), (c), (d), (e), (f), (g), 12, 13 and 15 of the complaint herein.

3. Deny each and every allegation contained in paragraph 4 of the complaint herein but admit that as of February 6, 1970, Continental Insurance owned 835,254 shares of Diners' Common Stock, par value $1 per share, or 34% of Diners' then outstanding Common Stock and that

Continental Insurance owned $18,750,000 (Eighteen Million Seven Hundred Fifty Thousand) principal amount of Convertible Debentures of Diners', convertible into a total of 424,430 shares of Diner's Common Stock and 100,000 shares of $7 Cumulative Convertible Preferred Stock of Diners', convertible into a total of 650,406 shares of Diners' Common Stock.

4. Deny each and every allegation contained in paragraph 5 of the complaint, and beg leave to refer to the Purchase Agreement for a full and complete statement of the terms and provisions thereof.

5. Deny each and every allegation contained in paragraph 6 of the complaint, but admit that defendant DFT has engaged in the business of providing travel and related services since October, 1967.

6. Deny each and every allegation contained in paragraphs 7 and 8 of the complaint herein, but admit that on or about October 1, 1968, plaintiff Otto Marx, Jr. received 18,623 shares of Diners' Common Stock, and beg leave to refer to the said Employment Agreement and the amendments thereto for a full and complete statement of the terms and provisions thereof and the consideration therefor.

7. Deny each and every allegation contained in paragraph 11(h) of the complaint, but admit that the defendant Diners' filed a Registration Statement (Form S-1) with the Securities and Exchange Commission on

August 28, 1969 pursuant to the provisions of section 10.2(b) of the Purchase Agreement which is accurately quoted in this subparagraph 11(h) of the complaint.

8. Deny each and every allegation contained in paragraph 14 of the complaint, but admit that plaintiff Otto Marx, Jr. sold 18,623 shares of Diners' Common Stock to defendant Continental pursuant to the latter's offer dated February 6, 1970, as extended, to purchase common stock of Diners' at $15 per share.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

9. Plaintiffs have failed to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE AGAINST PLAINTIFFS MARX & CO., INC. AND JOHN V. SUMMERLIN, JR.

10. Plaintiffs Marx & Co., Inc. and John V. Summerlin, Jr. have no standing to join in this action as they have never purchased, owned or sold the shares of Diners' Common Stock upon which the action herein is based.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

11. On or about October 10, 1967, defendant Diners' entered into a Purchase Agreement with Fugazy Travel Bureau, Inc., a New York corporation (the name of which was changed to F. T. Ventures, Inc. (Ventures)) pursuant to which Diners' purchased substantially all of the assets of Ventures in exchange for 57,000 shares

of Diners' Common Stock and $2,716,997 (Two Million Seven Hundred Sixteen Thousand Nine Hundred and Ninety-seven Dollars) in cash.

12. Defendant, Diners', accepted the assets of Ventures and duly performed all the conditions of the contract on its part.

13. Except as aforesaid there was no further consideration exchanged for the said common stock of Diners'.

14. The value, if any, of the assets, as asserted by plaintiffs and exchanged by Ventures, was grossly inflated, exaggerated, deceptive, and much less than their value as alleged.

15. Plaintiffs at the time of the exchange had full knowledge of the aforesaid agreement, the conditions under which the common stock of Diners' was so exchanged and the true value, if any, of the assets of Ventures.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

16. Plaintiffs' alleged damages must be computed from the actual value of the assets exchanged for the shares of Diners' Common Stock rather than from the then current open market price of the said shares.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

17. The value of the aforesaid assets, exchanged for the shares of Diners' Common Stock, is indeterminate leaving recission of the Purchase Agreement as the sole appropriate remedy.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

18. The right of action set forth in the complaint accrued more than one year prior to the commencement of this action.

19, At all times mentioned in the complaint and from the time when the right of action alleged in the complaint accrued, there were and now are statutes of limitations as provided in the Securities Act of 1933, §13, 15 USCA §77m and in the Securities Exchange Act of 1934, §18, 15 USCA §78r requiring that actions as alleged in the complaint be commenced within one year.

20. The right of action set forth in the complaint did not accrue within one year next before the commencement of this action.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE AND A FIRST COUNTERCLAIM BY THE DINERS' CLUB, INC. AND DINERS/WORLD TRAVEL, INC. AGAINST PLAINTIFFS, MARX & CO., INC., JOHN V. SUMMERLIN, JR. AND OTTO MARX, JR. AND DEFENDANT F.T. VENTURES, INC.

21. This cause of action arises under Section 27 of the Securities and Exchange Act of 1934, 15 U.S.C. §78aa, for violating Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j and Rule 10(b)-5 promulgated thereunder.

22. Repeats and realleges each and every allegation contained in Paragraphs 11 through 17 above as if set forth in full herein.

23. Upon information and belief F.T. Ventures, Inc. (hereinafter "Ventures") at all times mentioned herein was and still is a corporation organized and existing under the laws of the State of New York, which has its principal place of business in the County, City and State of New York.

24. Upon information and belief Marx & Co., Inc. at all times mentioned herein was and still is a corporation organized and existing under the laws of the State of New York, which has its principal place of business in the County, City and State of New York.

25. Upon information and belief Marx & Co., Inc. at all times mentioned herein was and still is the controlling stockholder of Ventures.

26. Upon information and belief Otto Marx, Jr. is an individual residing in the County, City and State of New York and at all times herein mentioned was and still is the controlling stockholder and president of Marx & Co., Inc. and Chairman of the Board of Ventures, and at all times hereafter mentioned was a director of Diners/ Fugazy Travel, Inc. [the name has since been changed to Diners World Travel, Inc. (hereinafter "DWT")] and a consultant in the employ of DWT.

27. Upon information and belief John V. Summerlin, Jr. is an individual residing in the County, City and State of New York and is an officer of Marx & Co., Inc. and is an officer and director of Ventures.

28. On or about October 10, 1967 Diners and Fugazy Travel Bureau, Inc. [the name of which was changed to F.T. Ventures, Inc. (Ventures)], a New York corporation, entered into an agreement (hereinafter "Purchase Agreement") pursuant to which Diners purchased substantially all the assets of Ventures on October 30, 1967 in exchange for 57,000 (Fifty-Seven Thousand) shares of common stock of Diners and $2,716,997 (Two Million Seven Hundred Sixteen Thousand Nine Hundred Ninety-Seven Dollars) in cash. Said assets were transferred to DWT, a wholly owned subsidiary of Diners.

29. On or about October 30, 1967 Diners, as part of the consideration for and as an integral part of the transaction described in the preceding paragraph, entered

into employment agreements with the three principal officers of Ventures providing a salary plus percentage compensation for each of said officers.

30. Diners entered into one of said employment agreements with plaintiff Otto Marx, Jr., which provided for a salary as consultant of $6,000 (Six Thousand Dollars) per year plus the greater of 20% of all franchise sale income of DWT or 16 2/3% of the net income of DWT for fifteen years.

31. On or about October 1, 1968 the principal officers of Ventures through plaintiff Otto Marx, Jr., negotiated amendments to each of said employment agreements with Diners and DWT.

32. Each of said amended employment agreements replaced the percentage compensation with a liquidated sum of money, plus shares of Diners' common stock, plus a provision limiting the liability of Ventures and/or the principal stockholders thereof arising under the Purchase Agreement.

33. Pursuant to the amended employment agreement with Otto Marx, Jr., Diners and DWT paid to Otto Marx, Jr. $121,875.00 (One Hundred and Twenty-One Thousand Eight Hundred and Seventy-Five Dollars) and 18,623 (Eighteen Thousand Six Hundred Twenty-Three) shares of Diners' common stock.

34. From July, 1967 to October 1, 1968 plaintiff Otto Marx, Jr., acting individually and as the Chairman

of the Board of Directors of defendant Ventures, and through and on behalf of other principal officers of Ventures, knowingly made material misrepresentations and omissions concerning

(a) the viability of the franchise concept as developed by plaintiff Otto Marx, Jr. and defendant Ventures;

(b) the projection of future franchise sales; and

(c) the cost and expense of managing, operating and carrying on the franchise system;

all with the intent to deceive and defraud Diners and DWT and to induce defendant Diners to issue said shares of stock and to enter into the Purchase Agreement, the Employment Agreements and amended employment agreements.

35. From October 30, 1967 to October 1, 1968 plaintiff Otto Marx, Jr., acting individually and as the chairman of the board of defendant Ventures, and through and on behalf of other principal officers of Ventures, materially breached the duties owed to DWT in his fiduciary capacity as a consultant and director of DWT in that he failed to reveal

(a) the non-viability of the franchise concept as conceived by Ventures;

(b) the true projection as to the future franchise sales; and

(c) the cost and expense of managing and assisting in the operation of said franchises and carrying on the franchise system;

all with the intent to induce Diners to issue said shares of stock and to enter into the amended employment agreement.

36. In connection with the Purchase Agreement Otto Marx, Jr., individually and as the chairman of the

board of Ventures, delivered to Diners financial statements of Ventures which were not prepared in accordance with generally accepted accounting principles consistently applied and did not present a fair and accurate picture of Ventures' consolidated financial position.

37. The mails and other instrumentalities of interstate commerce were used in connection with the aforementioned unlawful conduct.

38 As a result of plaintiffs' and defendant Ventures' unlawful, fraudulent and manipulative conduct, defendants Diners and DWT have sustained damages in a substantial amount which cannot be ascertained at the present time, but which defendants Diners and DWT believe to be substantially in excess of $5,000,000 (Five Million Dollars).

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE AND A SECOND COUNTERCLAIM BY THE DINERS' CLUB, INC. AND DINERS' WORLD TRAVEL, INC. AGAINST PLAINTIFFS, MARX & CO., INC., JOHN V. SUMMERLIN, JR. AND OTTO MARX, JR. AND DEFENDANT F.T. VENTURES, INC.

39. Repeats and realleges each and every allegation contained in Paragraphs 22 through 38 above as if set forth in full herein.

40. Diners and DWT relied on the aforementioned misrepresentations and omissions with regard to each of the said agreements and would not have entered into the said agreements except for the aforementioned misrepresentations and omissions.

41. As a result of plaintiffs' and defendant

Ventures' unlawful, fraudulent and manipulative conduct defendants Diners and DWT have sustained damages in an amount which cannot be ascertained at the present time, but which defendants Diners and DWT believe to be in excess of $20,000,000 (Twenty Million Dollars).

AS AND FOR A NINTH AFFIRMATIVE DEFENSE AND A THIRD COUNTERCLAIM BY THE DINERS' CLUB, INC. and DINERS/FUGAZY TRAVEL, INC. AGAINST PLAINTIFFS MARX & CO., INC., JOHN V. SUMMERLIN, JR. AND OTTO MARX, JR. AND DEFENDANT F. T. VENTURES, INC.

42. Repeats and realleges each and every allegation contained in paragraphs 22 through 41 above, as if set forth in full herein.

43. The Purchase Agreement §2.21 provides that:

"Disclosure. No representation or warranty by Fugazy in this Agreement or in any Schedule or certificate or other document furnished or to be furnished to Diners pursuant hereto, or in connection with the transactions contemplated hereby, contains or will contain any untrue statement of a material fact, or omits or will omit to state a material fact required to be stated therein or necessary to make the statements contained therein not misleading or necessary in order to provide a prospective purchase of the business of Fugazy and its Subsidiaries with proper information as to the business and affairs of Fugazy and its Subsidiaries."

Plaintiffs and defendant Ventures, breached the said provisions of the Purchase Agreement in that they knowingly misrepresented material facts and omitted material facts which were necessary to provide a prospective purchaser of the business of Ventures with information as to the business and affairs of Ventures.

44. The aforementioned misrepresentations and omissions of material facts constituting breaches of

warranty include, but are not limited to the following:

a) The financial statements of Ventures were not prepared in accordance with generally accepted accounting principles consistently applied and did not present a fair and accurate picture of Ventures' consolidated financial position as warranted in paragraphs 2.4 and 2.21 of the Purchase Agreement.

b) Accounts receivable were not collectible and established reserves were not sufficient as warranted in paragraphs 2.6 and 2.21 of the Purchase Agreement.

c) Ventures entered into contracts not in the ordinary course of business in contravention of paragraphs 2.10, 2.16 and 2.21 of the Purchase Agreement.

45. Plaintiff Otto Marx, Jr. materially breached his amended employment agreement with Diners and DFT in that he sold his 18,623 (Eighteen Thousand Six Hundred Twenty-Three) shares in violation of the provisions of said amended employment agreement.

46. As a result of plaintiffs' and defendant Ventures' material breach of the Purchase Agreement, defendant Diners sustained damages in a substantial amount which cannot be ascertained at the present time, but which defendants Diners and DFT believe to be substantially in excess of $5,000,000 (Five Million Dollars).

WHEREFORE, the defendants demand:

1. That the Court order F. T. Ventures, Inc. to be made a party defendant and to respond to the counterclaim herein.

2. That the defendants Diners and DWT have judgment on their first counterclaim against the plaintiffs and the additional defendant on counterclaim F. T. Ventures, Inc. in an amount which defendants Diners and DWT believe to be in excess of $5,000,000 (Five Million Dollars).

3. That the defendants Diners and DWT have judgment on their second counterclaim against the plaintiffs and the additional defendant on counterclaim F. T. Ventures, Inc. in an amount which defendants Diners and DWT believe to be in excess of $20,000,000 (Twenty Million Dollars).

4. That the defendants Diners and DWT have judgment on their third counterclaim against the plaintiffs and the additional defendant on counterclaim F. T. Ventures, Inc. in an amount which defendants Diners and DWT believe to be in excess of $5,000,000 (Five Million Dollars).

5. That the second amended complaint be dismissed and that the defendants have their costs and disbursements in this action and such other, further or different relief as may be just and proper.

KELLEY DRYE WARREN CLARK CARR & ELLIS
Attorneys for Defendants

By _____
A Member

Dated: New York, New York
January 28, 1971

74 Civ. [illegible]

[illegible]

PARK & CO., I[illegible], JOHN V. [illegible],
JR., and [illegible], JR.,

Plaintiffs,

- against -

THE [illegible], INC., [illegible]
[illegible], INC., [illegible]
[illegible],

Defendants,

P.I. [illegible], INC.,

Additional Defendant
on the Counterclaims

ANSWER TO ANSWER

COPY RECEIVED

Robinson, Silverman, Pearce, Aronsohn & [illegible]

By [signature]

Date 1/28/74

KELLEY DRYE WARREN CLARK CARR & ELLIS
350 PARK AVENUE, NEW YORK 10022
752-5800

A-38

Filed July 12, 1971

COPY RECEIVED
JUL 1971
SKADDEN, ARPS, SLATE, MEAGHER & FLOM

Plaintiff's Answer to Defendants' Counterclaims

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants.

F. T. VENTURES, INC.,

Additional Defendant on Counterclaims.

----------X

ANSWER

70 Civ. 3064

Tyler, J.

The plaintiffs, by and through their Special Counsel, Greenspan, Aurnou, Davis & Fredericks, in and for their answer to the defendants' counterclaims, respectfully allege as follows:

AS ANSWER TO THE FIRST COUNTERCLAIM

1. Deny information sufficient to form a belief as to the allegations set forth in paragraph "21" of defendants' amended answer.

2. Deny each and every allegation set forth in paragraph "22", including each and every paragraph referred to therein by reference, except admit the allegations in paragraph "11" of the defendants' amended answer.

3. Deny each and every allegation set forth in paragraph "23" of defendants' amended answer, except admit that F. T. Ventures, Inc., was a corporation organized and existing under the laws of the State of New York which had its principal place of business in the County, City and State of New York.

4. Admit each and every allegation as set forth in paragraph "24" of the defendants' amended answer.

5. Deny each and every allegation set forth in paragraph "25" of the amended answer, except admit that Marx & Co., Inc., was a substantial stockholder of F. T. Ventures, Inc.

6. Deny each and every allegation set forth in paragraph "26" of the amended answer, except admit that Otto Marx, Jr., resides in the County, City and State of New York, and was and is a controlling stockholder and President of Marx & Co., Inc., and was Chairman of the Board of F. T. Ventures, Inc., and also a director of Fugazy Travel, Inc., and a consultant to said company.

7. Admit each and every allegation as set forth in paragraphs "27", "28", "29", and "30" of the defendants' amended answer.

8. Deny each and every allegation as set forth in paragraph "31" of defendants' amended answer.

9. The documents referred to in paragraph "32" of the defendants' amended answer speak for themselves.

10. Admit each and every allegation as set forth in paragraph "33" of defendants' amended answer.

11. Deny each and every allegation as set forth in paragraphs "34", "35", "36", "37" and "38" of defendants' amended answer.

AS ANSWER TO THE SECOND COUNTERCLAIM

12. Repeats and realleges each and every allegation heretofore set forth in paragraphs "1" through "11", inclusive, with the same force and effect as if more fully set forth herein.

13. Deny each and every allegation as set forth in paragraphs "40" and "41" of defendants' amended answer.

AS ANSWER TO THE THIRD COUNTERCLAIM

14. Repeats and realleges each and every allegation heretofore set forth in paragraphs "1" through "13", inclusive, with the same force and effect as if more fully set forth herein.

15. Deny each and every allegation as set forth in paragraph "43" of defendants' amended answer, except admit the language set forth in the amended answer as to the provisions as to Section 2.21 of the purchasing agreement.

16. Deny each and every allegation as set forth in paragraph "44" of the defendants' amended answer, including all subparagraphs as set forth therein.

17. Deny each and every allegation as set forth in paragraph "45" of the defendants' amended answer, except admit that Otto Marx, Jr., has sold certain of his shares in Diners.

18. Deny each and every allegation as set forth in paragraph "46" of the defendants' amended answer.

WHEREFORE, plaintiffs demand that the aforesaid counterclaims be dismissed and that plaintiffs be given judgment in accordance with the relief requested in their complaint.

GREENSPAN, AURNOU, DAVIS & FREDERICKS

By: _____
A Member of the Firm

Attorneys for Plaintiffs
One North Broadway
White Plains, New York 10601
914-946-2500

and

FRIEDMAN, KOVEN, SHAPIRO, SALZMAN, KOENIGSBERG, SPECKS & HOMER
208 South LaSalle Street
Chicago, Illinois
312 FI 6-8500

and

ROBINSON, SILVERMAN, PEARCE, ARONSOHN & SAND
230 Park Avenue
New York, New York 10017
212 MU 9-7766

BEST COPY AVAILABLE

Answer of F.T. Ventures, Inc. to Defendants' Counterclaims A-42 Dated July 29, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants.

F. T. VENTURES, INC.,

Additional Defendant on the Counterclaims.

----------X

COPY RECEIVED BY MAIL
JUL 29 1971
SKADDEN, ARPS, SLATE, MEAGHER & FLOM

ANSWER

70 Civ. 3064

Tyler, J.

The above-named additional defendant on the counterclaims, F. T. VENTURES, INC., by its attorneys, Friedman, Koven, Shapiro, Salzman, Koenigsberg, Specks & Homer, in and for its answer to the defendants' counterclaims, respectfully alleges as follows:

AS ANSWER TO THE FIRST COUNTERCLAIM

1. Denies each and every allegation set forth in paragraph "21" of defendants' amended answer.

2. Denies each and every allegation set forth in paragraph "22" of defendants' amended answer, including each and every allegation contained in paragraphs "11" through "17" referred to therein by reference, and with respect to said paragraph "11" begs leave to refer to the Purchase Agreement for a full and complete statment of the terms and provisions thereof.

3. Denies each and every allegation set forth in paragraph "23" of defendants' amended answer, but admits that F. T. Ventures, Inc. was a corporation organized and existing under the laws of the State of New York which had its principal place of business in the County, City and State of New York, but states that F. T. Ventures, Inc. was de facto dissolved.

4. Admits each and every allegation set forth in paragraph "24" of the defendants' amended answer.

5. Denies each and every allegation set forth in paragraph "25" of defendants' amended answer, but admits that Marx & Co., Inc. was a substantial stockholder of F. T. Ventures, Inc.

6. Denies each and every allegation set forth in paragraph "26" of defendants' amended answer, but admits that Otto Marx, Jr. resides in the County, City and State of New York, and was and is a controlling stockholder and President of Marx & Co., Inc., and was Chairman of the Board of F. T. Ventures, Inc., and also a director of Diners/Fugazy Travel, Inc., and a consultant to said company.

7. Admits each and every allegation set forth in paragraph "27" of defendants' amended answer.

8. Denies each and every allegation set forth in paragraph "28" of defendants' amended answer, and begs leave to refer to the Purchase Agreement for a full and complete statement of the terms and provisions thereof.

9. Denies each and every allegation set forth in paragraph "29" of defendants' amended answer, and begs leave to refer to the employment agreements for a full and complete

statement of the terms and provisions thereof.

10. Denies each and every allegation set forth in paragraph "30" of defendants' amended answer, and begs leave to refer to the employment agreement with Otto Marx, Jr. for a full and complete statement of the terms and provisions thereof.

11. Denies each and every allegation as set forth in paragraph "31" of defendants' amended answer.

12. Denies each and every allegation set forth in paragraph "32" of defendants' amended answer, and begs leave to refer to the amended employment agreements for a full and complete statement of the terms and provisions thereof.

13. Admits each and every allegation as set forth in paragraph "33" of defendants' amended answer.

14. Denies each and every allegation set forth in paragraphs "34", "35", "36", "37" and "38" of defendants' amended answer.

AS ANSWER TO THE SECOND COUNTERCLAIM

15. As to paragraph "39" of defendants' amended answer, repeats and realleges each and every allegation heretofore set forth in paragraphs "2" through "14" above with the same force and effect as if more fully set forth herein.

16. Denies each and every allegation set forth in paragraphs "40" and "41" of defendants' amended answer.

AS ANSWER TO THE THIRD COUNTERCLAIM

17. As to paragraph "42" of defendants' amended answer, repeats and realleges each and every allegation heretofore set forth in paragraphs "2" through "16" above with the

same force and effect as if more fully set forth herein.

18. Denies each and every allegation as set forth in paragraph "43" of defendants' amended answer, but admits the language set forth in defendants' amended answer as to the provisions of Section 2.21 of the Purchase Agreement quoted therein.

19. Denies each and every allegation set forth in paragraph "44" of defendants' amended answer, including all subparagraphs as set forth therein.

20. Denies each and every allegation set forth in paragraph "45" of defendants' amended answer, but admits that Otto Marx, Jr. has sold certain of his shares in Diners.

21. Denies each and every allegation set forth in paragraph "46" of the defendants' amended answer.

WHEREFORE, the above-named additional defendant on the counterclaims, F. T. Ventures, Inc., demands that the aforesaid counterclaims be dismissed, and that said additional defendant have its cost and disbursements in this action and such other, further or different relief as may be just and proper.

FRIEDMAN, KOVEN, SHAPIRO, SALZMAN,
KOENIGSBERG, SPECKS & HOMER

By _____
A Member of the Firm

Attorneys for F. T. Ventures, Inc.
208 South La Salle Street
Chicago, Illinois 60604
312/346-8500

and

ROBINSON, SILVERMAN, PEARCE,
ARONSOHN & SAND
230 Park Avenue
New York, New York 10017
212/MU 9-7766

and

PERRY GOLDBERG
208 South La Salle Street

93 3/27/73

Answer to Third Party Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., DINERS FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants.

F. T. VENTURES, INC.,

Additional Defendant on the Counterclaims,

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Third-Party Defendants.

Action No. 1

70 Civ. 3064

(Assigned to Judge Knapp)

ANSWER TO THIRD-PARTY COMPLAINT

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs,

-against-

THE DINERS'CLUB, INC., DINERS/ FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants.

MARX & CO., INC., OTTO MARX, JR., F.T. VENTURES, INC. and JOHN V. SUMMERLIN, JR.,

Additional Defendants on the Counterclaims.

Action No. 2

William D. Fugazy and Louis V. Fugazy, third-party defendants herein, by and through their attorneys Harris & Fredericks, as and for their answer to the third-party complaint herein, allege as follows:

1. Denies knowledge or information sufficient to form a belief as to the allegations in paragraphs "1", "2", "3" and

"4" of the said third-party complaint herein.

2. Admits=the allegations contained in paragraphs "5" and "6".

3. Denies the allegations contained in paragraphs "7", "8", "9", and "10", except admits the allegations set forth in the complaint as having been properly pleaded.

4. Denies each and every allegation contained in paragraphs "11", "12", "13", "14", "15", and "16", of the said third-party complaint herein.

WHEREFORE the defendants above named demand that the third-party complaint herein be dismissed, together with the costss and disbursements hereof, and for such other and further relief as the Court may deem just and proper.

HARRIS & FREDERICKS

By _____
Barry I. Fredericks
A Member of the Firm

Dated: March 27, 1973.

1271 Avenue of the Americas
New York, New York 10020

BEST COPY AVAILABLE

Pre-Trial Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

MARX & CO., INC., et al

Plaintiffs

-against-

THE DINERS' CLUB, INC., et al

Defendants.

70 Civ. 3064

(Judge Knapp)

F. T. VENTURES, INC.,

Additional Defendants on the Counterclaims,

PRE TRIAL ORDER

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Third-Party Defendants.

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs

-against-

THE DINERS' CLUB, INC., et al

Defendants,

MARX & CO., INC., et al,

Additional Defendants on the Counterclaims.

----------X

A. JURISDICTIONAL STATEMENT:

1. The jurisdiction of this Court over the pending action is based upon 15 U.S.C. Section 78aa and Sections 10(b) and 27 of the Securities and Exchange Act of 1934, 15 U.S.C. Section 78J(b) and Rule 10b-5 of the General Rules and Regulations of the Securities and Exchange Commission (17 C.F.R. Section 240.10b-5).

B. NATURE OF PLAINTIFF'S CAUSES OF ACTION:

I. As to plaintiffs Marx & Co., Inc., John V. Summerlin, Jr. and Otto Marx, Jr. (hereinafter collectively referred to as the Marx plaintiffs);

1. The Marx plaintiffs contend that they were fraudulently induced in October, 1967, to convey to the defendants their interests in a company known as Fugazy Travel Bureau, Inc., in exchange for a substantial number of shares of Diners' Club, Inc. common stock.

2. Plaintiff, Otto Marx individually, alleges that he was fraudulently induced to give up to the defendants certain rights which he had under an employment contract with the defendant, Diners' Club, Inc., dated October 30, 1967, in exchange for a substantial number of shares of the common stock of the defendant, The Diners' Club, Inc.

3. The Marx plaintiffs further charge the defendant, Diners, with failing and refusing to use its best efforts to register and make effective a Registration Statement permitting the Marx plaintiffs to sell their shares to the general public.

II. As to plaintiffs William D. Fugazy and Louis V. Fugazy (hereinafter collectively referred to as the Fugazy plaintiffs):

1. The Fugazy plaintiffs contend that they were fraudulently induced in October, 1967, to convey to the defendants their interest in a company known as Fugazy Travel Bureau, Inc., in exchange for a substantial number of shares of The Diners' Club, Inc. common stock.

2. Plaintiffs, William D. Fugazy and Louis V. Fugazy, individually, allege that they were fraudulently induced to give up to the defendants certain rights which they had under an employment contract with the defendant, The Diners' Club, Inc., dated October 30, 1967, in exchange for a substantial number of shares of the common stock of the defendant, The Diners' Club, Inc.

3. The Fugazy plaintiffs further charge the defendant, Diners' Club, with failing and refusing to use its best efforts to register and make effective a Registration Statement permitting the Fugazy plaintiffs to sell their shares to the general public.

C. NATURE OF DEFENDANTS' COUNTERCLAIM:

Defendants Diners and Diners World Travel have asserted three counterclaims against all of the plaintiffs, as well as additional defendants on the counterclaims (corporations owned and controlled by the plaintiffs), based upon securities fraud, common law fraud and breach of contract, seeking damages in the amount of at least $30 million, representing the amount of money that defendants paid to plaintiffs for the purchase of Fugazy Travel Bureau in October, 1967, and the amount of money defendants lost in the subsequent operation of that company. Defendants claim that plaintiff had defrauded Diners into purchasing a worthless company (Fugazy Travel Bureau) which had been "dressed up" by doctored financial statements, fraudulent transactions which "increased" the "income" of Fugazy Travel Bureau shortly before it was acquired by Diners, and plaintiffs' creation

of an unworkable franchise system as the pot of gold at the end of the rainbow. This forms the basis for the first counterclaim.

The second counterclaim seeks damages for the self-dealing perpetrated by the plaintiffs when employed by Diners and its subsidiary (Diners World Travel, Inc.) in fiduciary capacities as officers and directors. Defendants claim that, in such capacities, plaintiffs engaged in self-dealing and decision-making which was intended solely to benefit themselves individually, to the detriment of Diners and Diners World Travel.

The third counterclaim asserts that plaintiffs breached certain material provisions in the agreement of October 1967 wherein Diners purchased the Fugazy Travel Bureau from plaintiffs, including the provision of said agreement wherein plaintiffs stated that:

> "No representation or warranty...in this agreement...or other document furnished or to be furnished to Diners pursuant hereto, or in connection with the transactions contemplated hereby, contains or will contain any untrue statement of a material fact, or omits or will omit to state a material fact required to be stated therein or necessary to make the statements contained therein not misleading or necessary in order to provide a prospective purchaser of the business of Fugazy and its subsidiaries with proper information as to the business and affairs of Fugazy and its subsidiaries."

D. FACTS NOT IN ISSUE:

1. Plaintiff Marx & Co., Inc. (hereinafter sometimes referred to as "Marx & Co.") is a corporation organized and existing under the laws of the State of New York, which has its principal place of business in the City, County and State of New York.

2. Defendant, The Diners' Club, Inc. (hereinafter sometimes referred to as "Diners") is a corporation organized and existing under the laws of the State of New York, which has its principal place of business in the City, County and State of New York.

3. Defendant, Diners/Fugazy Travel, Inc., now known as Diners World Travel, Inc. ("DWT"), is a corporation organized and existing under the laws of the State of Delaware, which has its principal place of business in the City, County and State of New York. DWT is a wholly-owned subsidiary of Diners.

4. Defendant, The Continental Corporation (hereinafter sometimes referred to as "Continental") is a corporation organized and existing under the laws of the State of New York, which has its principal place of business in the City, County and State of New York.

5. Defendant, The Continental Insurance Company (hereinafter sometimes referred to as "Continental Insurance") is a corporation organized and existing under the laws of the State of New York, which has its principal place of business in the City, County and State of New York. Continental Insurance is a wholly-owned subsidiary of Continental.

6. During the period from on or about July 1967 to February 6, 1970, Continental Insurance owned 835,254 shares of Diners' common stock, par value $1.00 per share common stock, or 34% of Diners' then outstanding common stock. In addition, during that time, Continental Insurance owned $18,750,000 principal amount of Convertible Debentures of Diners, convertible into a total of 424,430 shares of Diners' Common Stock and 100,000 shares of $7 Cumulative Convertible Preferred

Stock of Diners, convertible into a total of 650,406 shares of Diners' Common Stock.

7. On or about October 10, 1967, the defendant, Diners' Club, Inc. (hereinafter "Diners") and Fugazy Travel Bureau, Inc. (the name of which was changed to F. T. Ventures, Inc. (hereinafter "Ventures")) entered into an agreement pursuant to which Diners purchased substantially all of the assets of Ventures in exchange for 57,000 shares of the common stock of Diners and $2,716,999.00.

8. The employment agreement entered into between plaintiff, Marx, and defendant, Diners Fugazy Travel effective October 30, 1967, provides, among other things, for a salary as consultant of $6,000 per year for percentage compensation to plaintiff for a maximum period of 15 years at a rate of 20% of the initial franchise fees received by DFT, or 16-2/3% of the net profits of DFT, whichever was greater, subject to a $250,000 per fiscal year limitation and a $2,500,000 aggregate limitation.

9. On or about October 1, 1968, Otto Marx, Jr., entered into amendments to each of said employment agreements with Diners and DWT.

10. Pursuant to the amended employment agreement with Otto Marx, Jr., Diners and DWT paid to Otto Marx, Jr. $121,875.00 (One Hundred and Twenty-One Thousand Eight Hundred and Seventy-Five Dollars) and 18,623 (Eighteen Thousand Six Hundred Twenty-Three) shares of Diners' common stock.

11. The plaintiff, William Fugazy, was at times relevant hereto a director of the defendant Diners, the president of Diners from in or about April 1968 to in or about February 1969, and the president and a director of DWT.

12. The plaintiff, Louis Fugazy, at times relevant hereto was an employee and vice-chairman of the board of DWT.

13. On or about October 30, 1967, the defendant Diners entered into an employment agreement with plaintiffs William Fugazy and Louis Fugazy.

14. The employment agreement with William Fugazy provided, among other things, for a salary to be paid to him by DWT in the yearly amount of $75,000, plus $25,000 for expenses, plus the greater of 10% of the initial fees from franchise sales by DWT or 8-1/3% of the net profits of DWT, for a period of up to 15 years.

15. The employment agreement with Louis Fugazy provided, among other things, for a salary to be paid to him by DWT in the yearly amount of $35,000, plus the greater of 10% of the initial fees from franchise sales by DWT or 8-1/3% of the net profits of DWT, for a period of up to 15 years.

16. On or about October 1, 1968, amendments to these employment agreements were entered into pursuant to which, inter alia, the percentage compensation provisions were eliminated and William Fugazy and Louis Fugazy each received from Diners and DWT $60,937.50 (Sixty Thousand Nine Hundred and Thirty-Seven and 50/100 Dollars) and 9,311 (Nine Thousand Three Hundred and Eleven) shares of Diners' common stock.

E. THE MARX PLAINTIFFS' CONTENTIONS

1. During the period from on or about July 1967 through February 6, 1970, the defendant Continental Insurance was in control of the defendant Diners, its directors and officers and exercised a controlling influence over the operations, management and policies of Diners and its subsidiaries.

2. At various times prior to October 10, 1967, the defendant Diners represented to the plaintiffs that Diners would within the near future be acquired by the defendants Continental Insurance or Continental Corporation, and that as a result thereof the value of Diners' Common Stock would be substantially increased.

3. At the time that the aforesaid statements were made by the defendant Diners they were false and fraudulent and constituted a misrepresentation of material facts.

4. Plaintiff contends that the aforesaid misstatements of material facts were made as part of a fraudulent scheme entered into among the defendants directed to permit defendant Diners to acquire the assets of Fugazy Travel Bureau.

5. The Marx Plaintiffs contend that at various times during the period from October 30, 1967 to October 30, 1968, the defendant Diners, the defendant Continental Corporation and defendant Continental Insurance Company represented to the Marx plaintiffs and particularly the plaintiff Otto Marx, that the acquisition of Diners by the defendants Continental Corporation and Continental Insurance Company was imminent and that as a result thereof the value of Diners' Common Stock would be substantially increased.

6. At the times that the aforesaid statements were made by the defendants they were false and fraudulent and

constituted a misrepresentation of material facts.

7. Plaintiff contends that the aforesaid misstatements of material facts were made as part of a fraudulent scheme entered into among the defendants, directed to permit defendant Diners to induce the plaintiff Marx to give up the cash monies being paid to him under his employment contract in exchange for additional shares of Diners' Common Stock.

8. Section 10.2(b) of the Purchase Agreement entered into between the Marx plaintiffs and the defendant Diners on October 10, 1967 (Purchase Agreement) required the defendant Diners, inter alia, to file a Registration Statement registering the shares of common stock of Diners held by the Marx plaintiffs.

9. Pursuant to the foregoing provisions of the Purchase Agreement the defendant Diners, on August 28, 1969, filed a Registration Statement (Form S-1) with the Securities and Exchange Commission but failed and refused to use its best efforts to cause such Registration Statement to become effective.

10. At various times from the period of May 1968 to February 6, 1970, the defendants engaged in various schemes and in unlawful and improper business conduct designed and calculated to defer the acquisition of defendant Diners by defendants Continental Corporation or Continental Insurance Company until such time as there had been a substantial decrease in the value of the common stock of defendant Diners.

11. At various times during the period May 1968 to February 6, 1970, the defendant Diners prepared and issued false and misleading financial statements. Which statements contained omissions and misrepresentations of material facts.

12. The aforesaid omissions, non-disclosures and misstatement of material facts resulted in an economic loss to the Marx plaintiffs.

F. THE FUGAZY PLAINTIFFS' CONTENTIONS

1. During the period from on or about July 1967 through February 6, 1970, the defendant Continental Insurance was in control of the defendant Diners, its directors and officers and exercised a controlling influence over the operations, management and policies of Diners and its subsidiaries.

2. At various times prior to October 10, 1967, the defendant Diners represented to the plaintiffs that Diners would within the near future be acquired by the defendants Continental Insurance or Continental Corporation, and that as a result thereof the value of Diners' Common Stock would be substantially increased.

3. At the time that the aforesaid statements were made by the defendant Diners, they were false and fraudulent and constituted a misrepresentation of material facts.

4. Plaintiffs contend that the aforesaid misstatements of material facts were made as part of a fraudulent scheme entered into among the defendants directed to permit defendant Diners to acquire the assets of Fugazy Travel Bureau, Inc.

5. The Fugazy plaintiffs contend that at various times during the period from October 30, 1967 to October 30, 1968, the defendant Diners, the defendant Continental Corporation and defendant Continental Insurance Company represented to the Fugazy plaintiffs and particularly the plaintiff William Fugazy, that the acquisition of Diners by the defendants Continental Corporation and Continental Insurance Company was imminent and that as a result thereof the value of Diners' Common Stock would be substantially increased.

6. At the times that the aforesaid statements were

made by the defendants they were false and fraudulent and constituted a misrepresentation of material facts.

7. Plaintiffs contend that the aforesaid misstatements of material facts were made as part of a fraudulent scheme entered into among the defendants, directed to permit defendant to induce the plaintiffs Fugazy to give up the cash monies being paid to them under their employment contracts in exchange for additional shares of Diners' Common Stock.

8. Section 10.2(b) of the Purchase Agreement entered into between the Fugazy plaintiffs and the defendant Diners on October 10, 1967 (Purchase Agreement) required the defendant Diners, inter alia, to file a Registration Statement registering the shares of common stock of Diners held by the Fugazy plaintiffs.

9. Pursuant to the foregoing provisions of the Purchase Agreement the defendant Diners, on August 28, 1969, filed a Registration Statement (Form S-1) with the Securities Exchange Commission but failed and refused to use its best efforts to cause such Registration Statement to become effective.

10. At various times from the period of May 1968 to February 6, 1970, the defendants engaged in various schemes and in unlawful and improper business conduct designed and calculated to defer the acquisition of defendant Diners by defendants Continental Corporation or Continental Insurance Company until such time as there had been a substantial decrease in the value of the common stock of defendant Diners.

11. At various times during the period May 1968 to February 6, 1970, the defendant Diners prepared and issued false and misleading financial statements. Which statements contained omissions and misrepresentations of material facts.

12. The aforesaid omissions, non-disclosures and misstatement of material facts resulted in an economic loss to the Fugazy plaintiffs.

G. THE MARX AND FUGAZY PLAINTIFFS' CONTENTIONS WITH RESPECT TO DEFENDANTS' COUNTERCLAIMS

1. The defendants were given full and complete access to all of the financial statements and financial records of Fugazy Travel Bureau, Inc. prior to the acquisition of the assets of that company by the defendant Diners.

2. The defendants retained their own personal accountants who were given access to and who examined the books and records of Fugazy Travel Bureau, Inc. prior to the acquisition of the assets of that company by the defendant Diners. No representations were made by the plaintiffs to the defendants which were not subject to and verified by the defendants' accountants prior to the acquisition.

3. The Purchase Agreement contained escrow provisions providing for the withholding of certain monies due to the plaintiffs subject to the verification by defendants' accountants, which escrow funds were ultimately released to the plaintiffs after the acquisition upon the verification of the accounting figures by the defendants' accountants.

4. The defendants substantially changed the franchise practices after it acquired all of the assets of Fugazy Travel Bureau, Inc.

5. The defendants continued to ignore the advice of the plaintiffs with respect to the manner in which the franchise operation should be conducted, and continued on a course of conduct in connection with operating the franchise which was completely contrary to the manner in which the plaintiffs had previously operated the franchise operation.

H. DEFENDANTS CONTENTIONS

1. In order for plaintiffs to prevail, they must prove the following allegations as necessary elements of their claim, each of which defendants deny:

(a) That defendants made false representations that Diners would be acquired by Continental Insurance and engaged in unlawful activity to induce plaintiffs to acquire and not to sell the common stock of Diners;

(b) That plaintiffs were so induced and did acquire and retain Diners stock as a direct result of said false representations and unlawful activity of defendants;

(c) That thereafter, defendants Continental and Continental Insurance intentionally engaged in acts designed to decrease the net earnings of Diners and DWT and to lower the value of the Diners stock held by plaintiffs;

(d) That the net earnings of Diners and DWT were decreased and the value of the Diners stock held by plaintiffs was lowered as the direct and proximate result of the intentional acts of Continental and Continental Insurance;

(e) That Continental and Continental Insurance then fraudulently and unlawfully prevented or deferred the acquisition of Diners until the value of the stock held by plaintiffs had dropped to a significant degree;

(f) That on February 6, 1970, Continental made an intentionally delayed tender offer, and

plaintiffs sold their Diners stock under the tender offer at a price lower than the prices of the stock in earlier years;

(g) That plaintiffs have each been damaged in an amount equal to the highest price which their Diners stock had ever achieved throughout their holding period, less the amount received by plaintiffs for their stock pursuant to the tender offer.

2. Plaintiffs have asserted a single cause of action under Rule 10B5 of the Securities Act of 1934 and, in order to recover, must prove by a fair preponderance of the evidence that defendants misrepresented or failed to disclose material facts, with knowledge of their materiality and falsity, and with intent to defraud plaintiffs, that plaintiffs relied on the representations made by defendants, and that as a direct result thereof, plaintiffs sustained damages.

3. At no time did any of the defendants make any false representation to plaintiffs or engage in any unlawful, fraudulent or improper device, scheme or artifice with respect to plaintiffs.

4. At no time did any of the defendants make any false representation or engage in any activity in order to induce plaintiffs to either acquire Diners stock or to refrain from selling their Diners stock.

5. At no time did defendant Continental Insurance and/or Continental engage in any activity designed to result in a decrease in the net earnings of Diners or DWT or a decrease in the value of Diners stock.

6. At no time did defendant Continental or defendant Continental Insurance engage in any device, scheme or

artifice designed to prevent or defer the acquisition of Diners by Continental or Continental Insurance until there had been a substantial decrease in the value of Diners stock.

7. At no time between July 1967 and February 6, 1970 (hereafter "the period in suit") did any of the defendants make any representation to any of the plaintiffs with respect to the following:

(a) That there definitely would be an acquisition of Diners by Continental;

(b) That such an acquisition would take place at any definite time;

(c) That such an acquisition would substantially increase the value of Diners stock.

8. Any statements made by any of the defendants during the period in suit concerning the possibility of an acquisition of Diners by Continental were merely statements discussing an event which might happen at some indefinite date in the future.

9. Those statements included candid comments that, inter alia, there might never be an acquisition of Diners by Continental, that projects of higher priority were envisioned by Continental which were to be achieved prior to any possible acquisition of Diners, that no acquisition could take place without the approval of Continental's board of directors which had not been given.

10. Since, in fact, an acquisition of Diners by Continental did take place in 1970, none of the statements of defendants with respect to such possible acquisition were false or could ever be construed as false.

11. Plaintiffs, all sophisticated businessmen, could not justifiably construe or rely on any statements of defendants as guarantees of the certainty of the acquisition of Diners by Continental or of any precise date when the event would occur and, to the extent they made any such assumptions, were merely engaged in routine business speculation at their own peril.

12. Plaintiffs in fact did not rely on any statements of defendants as a guarantee of a Continental acquisition at a definite date and engaged in no activity to their detriment or prejudice, and gave no consideration for any such guarantee.

13. All consideration given and all activities plaintiffs engaged in were in return for consideration given them by Diners in equal or greater amounts, totally without regard to any alleged representations of an acquisition.

14. Plaintiffs Louis Fugazy and John Summerlin never received any such alleged representations from defendants and received all such representations, if any, solely from plaintiffs Otto Marx and William Fugazy.

15. Plaintiff Otto Marx received all of such alleged representations solely from plaintiff William Fugazy and not from defendants.

16. While the alleged representations were never made by defendants, they were made by plaintiff William Fugazy in his individual capacity and for his own purposes, if at all, to plaintiffs Marx, Marx & Co., Summerlin and Louis Fugazy.

17. In all their dealings with Diners, plaintiffs received consideration greatly in excess of the value of the consideration they gave to Diners and, consequently,

have suffered absolutely no damage from any of the acts complained of.

18. The decline in the value of Diners stock was caused by a combination of general market conditions, by activities engaged in by plaintiffs to the detriment of Diners and by losses incurred by Diners from the acquisition of plaintiffs' company - Fugazy Travel Bureau - which acquisition was fraudulently induced by plaintiffs.

19. To the extent plaintiffs were not permitted to sell their stock, this was in no way the result of any misrepresentation by defendants, but solely due to the fact that the express terms of the stock itself and the agreements in suit, of which plaintiffs had full knowledge, prohibited sale of the stock in accordance with the Securities laws.

20. Plaintiffs were not required to sell their Diners stock at the time of the tender offer or at the tender offer price, but voluntarily chose to do so.

21. The failure of the Registration Statement to become effective was due in part to the refusal of the SEC to accept accounting practices adopted by and engaged in by plaintiffs.

22. Plaintiffs suffered no damage from the failure of the Registration statement to become effective

23. None of the acts alleged in the complaints forms the basis for any valid claim against defendants at law or in equity.

24. The transactions alleged in the complaints came about as a result of plaintiffs' false and fraudulent representations and omissions and acts designed to defraud and

induce Diners and DWT to enter into the said purchase and employment agreements and amendments thereto, and plaintiffs are thereby estopped and precluded from recovering therefor.

25. The transactions alleged in the complaint came about as a result of plaintiffs' false and fraudulent representations and omissions and acts designed to defraud and induce Diners and DWT to enter into the said purchase and employment agreements and amendments thereto and plaintiffs cannot obtain enforcement of and the fruits of such fraudulent conduct in this Court.

26. The damages sought by plaintiffs stem from various breaches and violations by plaintiffs of their confidential and fiduciary duties to Diners and DWT, including, but not limited to, self-dealing, conflict of interest, and diversion of corporate opportunity, and plaintiffsare thereby estopped and precluded from recovery therefor.

27. The acts complained of in the complaints arose from various breaches and violations by plaintiffs of their confidential and fiduciary duties to Diners and DWT, and plaintiffs cannot obtain enforcement of and the fruits of such fraudulent conduct in this Court.

28. Plaintiffs' claims are barred on the ground that plaintiffs, as officers and directors of Diners and Diners World Travel, were insiders and any information they claimed to have received was given to them as insiders, thus estopping them from either trading in the stock they received or relying on the information they allegedly received as the basis for any claim.

29. The Fugazy plaintiffs are estopped and precluded from maintaining this action by the statute of limitations and by gross laches, waiver and acquiescence in the acts complained of.

30. Plaintiffs knowingly made false material representations and engaged in fraudulent acts, schemes and devices to induce Diners to enter the same purchase and employment agreements and amendments of which plaintiffs complain in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 promulgated thereunder, and laws of the State of New York. As a result of plaintiffs' unlawful conduct, they fraudulently obtained consideration from and otherwise caused injury to Diners and DWT in an amount in excess of $30 million. The consideration paid to plaintiffs by Diners in these transactions totalled nearly $8 million.

31. Defendants contend that Fugazy Travel Bureau was a worthless company which had been dressed up by the plaintiffs through doctored financial statements and sham and nonexistent transactions which made Fugazy Travel Bureau look considerably more attractive than it was. In addition, plaintiffs created, as part of the operations of Fugazy Travel Bureau, an unworkable franchise system for the sale of travel agencies, and used that as a major selling point to induce Diners to enter into these transactions. Plaintiffs induced Diners to place them in positions as officers and directors of Diners and Diners World Travel, so that plaintiffs could continue their scheme. Plaintiffs misrepresented the "success" they had had with the franchise system, the expenses they had incurred and which would be incurred in running the franchise system, and the viability of the system as conceived and shaped by the plaintiffs.

32. Plaintiffs intentionally violated their confidential and fiduciary duties to Diners and DWT, including but not limited to self-dealing, conflict of interest, and

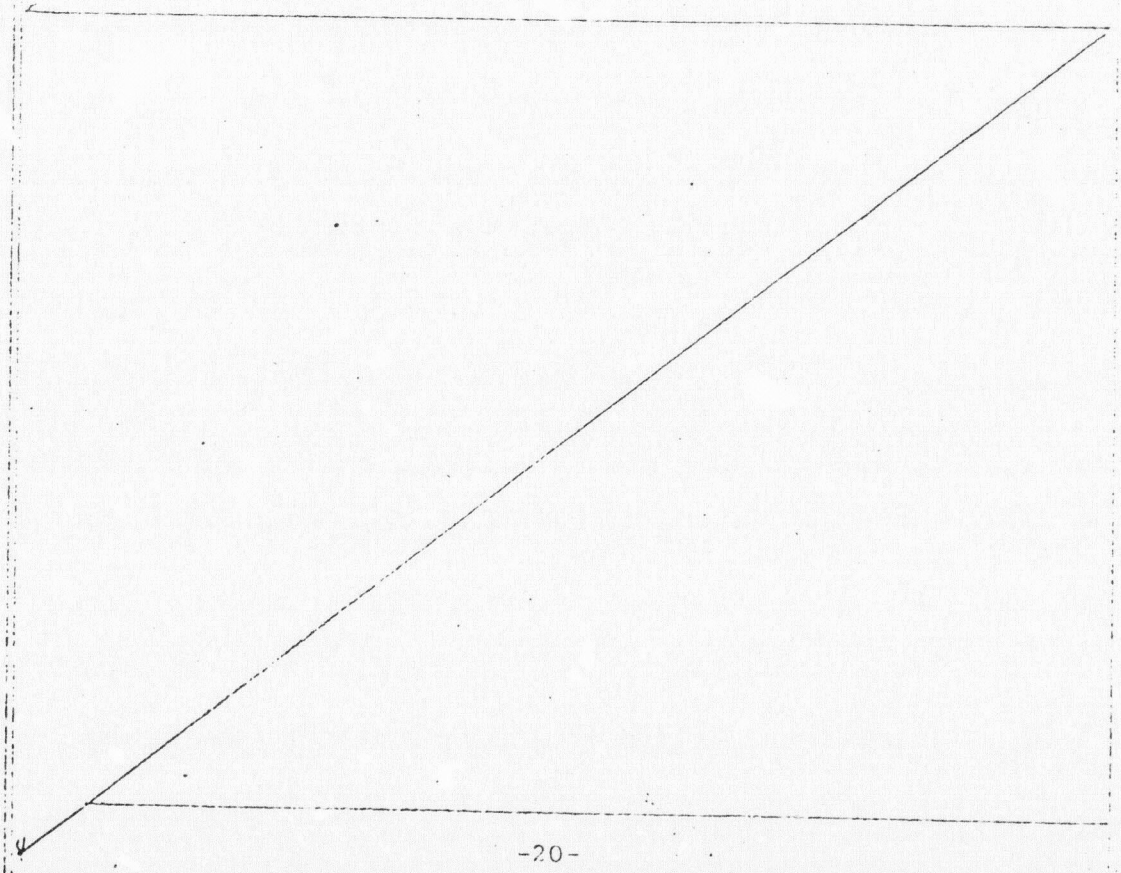
diversion of corporate opportunity which has caused injury to Diners and DWT in an amount in excess of $30 million.

33. Plaintiffs breached the terms and provisions of the same purchase agreement of which plaintiffs complain and have thereby caused injury to Diners and DWT in an amount in excess of $30 million.

34. Even if everything plaintiffs say is true, their damages are too speculative to ever permit any recovery.

I. LIST OF PLAINTIFFS' WITNESSES

William D. Fugazy
Louis V. Fugazy
Otto Marx, Jr.
John V. Summerlin, Jr.
Jules T. Asch
Alfred S. Bloomingdale
George Faunce III
Seymour Flug
Thomas A. Hays
J. Victor Herd
Harold E. Johnson

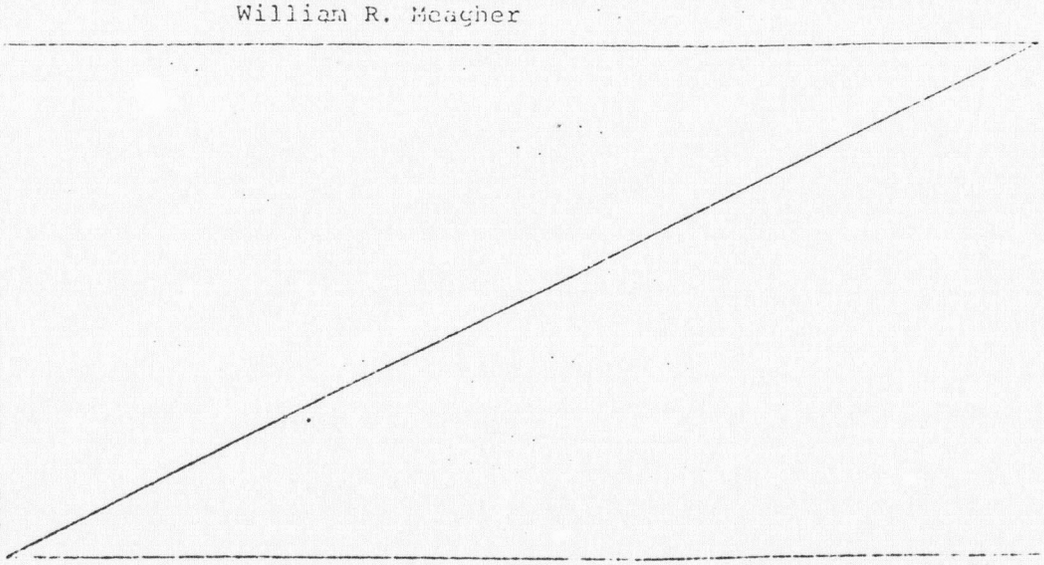


J. LIST OF DEFENDANT'S WITNESSES

William D. Fugazy
Louis V. Fugazy
Otto Marx, Jr.
John V. Summerlin
Jules T. Asch
Alfred S. Bloomingdale
George Faunce III
Seymour Flug
Matthew T. Gallagher
Thomas A. Hays
J. Victor Herd
Harold E. Johnson

WITNESSES ON THE COUNTERCLAIM

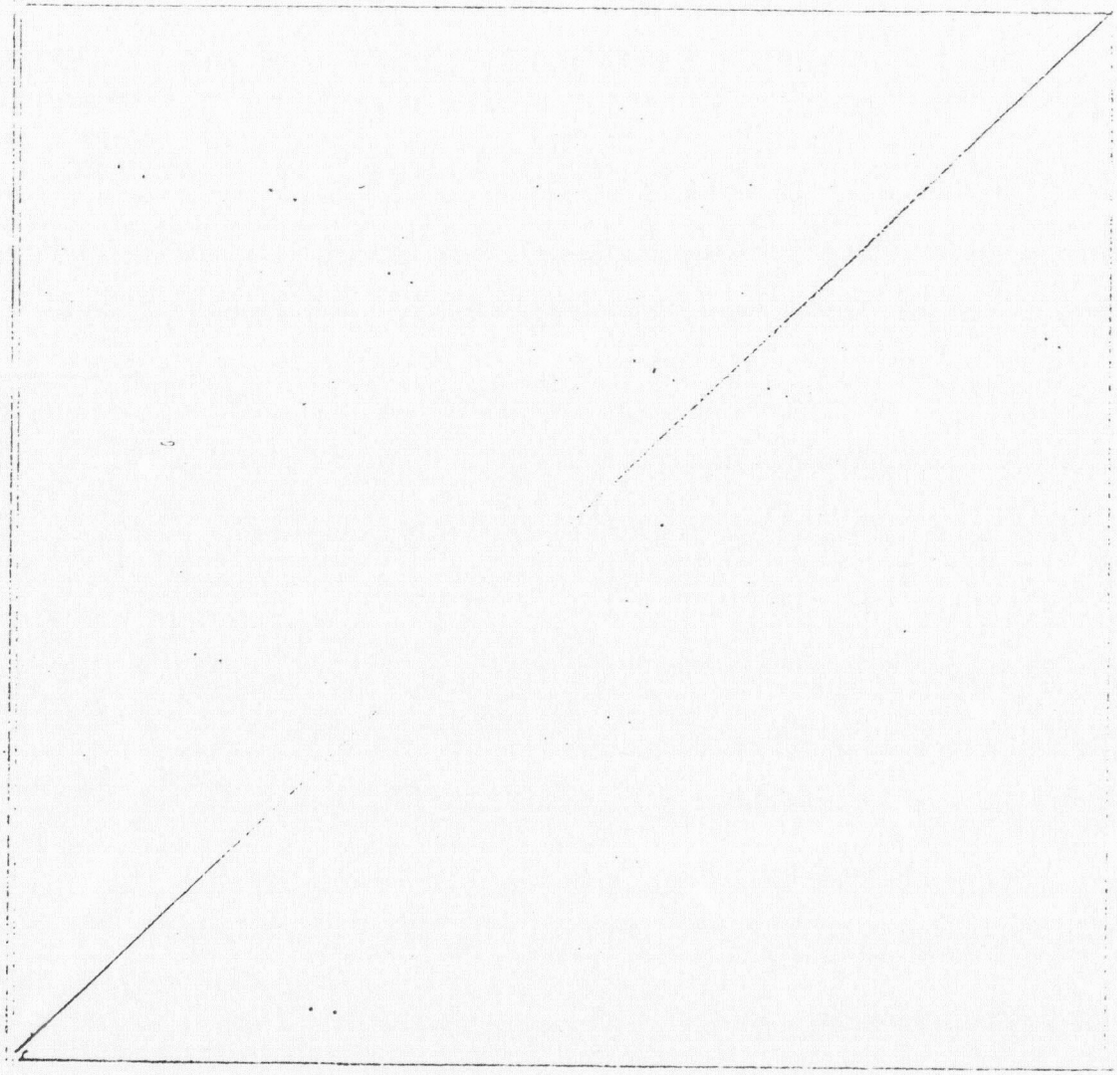
William D. Fugazy
Louis V. Fugazy
Otto Marx, Jr.
John V. Summerlin
Irwin Fruchtman
Robert Phillips
Milton Adler
James Durkin
Carmen Rodriquez
Lee Iaccocca
Jules T. Asch
Alfred S. Bloomingdale
George Faunce III
Seymour Flug
Matthew T. Gallagher
Tony Piscatella
Thomas A. Hays
R. Newell Lusby
William R. Meagher



K. LIST OF PLAINTIFF'S DOCUMENTS:

1. All documents referred to in the document entitled, "Identification of Documents by Plaintiffs Marx & Co., et al, dated December 13, 1973, previously filed in the proceedings herein.

2. All documents marked in the depositions of the following persons taken in these proceedings: William D. Fugazy; Louis V. Fugazy; Otto Marx, Jr.; John V. Summerlin, Jr.; Jules T. Asch; Alfred S. Blomingdale; George Faunce III; Seymour Flug; Thomas A. Hays; J. Victor Herd and Harold E. Johnson



L. LIST OF DEFENDANT'S DOCUMENTS

Acquisition Agreement of October 10, 1967, with exhibits.

Amendments to Employment Agreements of William D. Fugazy, Louis V. Fugazy, Otto Marx, Jr. of October 1, 1968.

Memorandum of Intention of July 20, 1967.

Pre-1968 Franchise & License Agreements of Fugazy Travel Bureau.

Letter to Gallagher from Fugazy of November 20, 1967.

Letter to the Fugazys from Otto Marx of January 16, 1968.

Escrow Agreement between the Fugazys, Ventures and Henry Marx of January 16, 1968.

Agreement between the Fugazys, Ventures, Marx & Co. and Summerlin of January 16, 1968.

Letter to the Fugazys from Marx & Co. of November 6, 1968.

Memo to Herd from Johnson of November 11, 1968.

Letter to Fugazy from Marx of November 13, 1968.

Memo to Diners Bd. from Asch of November 18, 1968.

Memo to Bloomingdale from Fugazy, undated.

Newsclipping from "The Travel Agent", quoting W. Fugazy of November 13, 1972.

Agreement between Travelco and Diners/Fugazy Travel Incentive Corp. of February 29, 1972.

Letter from William Fugazy to Wentworth of October 10, 1972.

Letter to Bloomingdale from Fugazy of April 14, 1965.

Letter to Fugazy from Bloomingdale of April 15, 1965.

Promissory Note from Fugazy Travel Bureau, Inc. to Travel Credit Corp. of June 30, 1966.

Promissory Note from Fugazy Travel Bureau to Travel Credit Corp. of July 6, 1966.

Promissory Note from FTB to Marx & Co. of October 20, 1966.

Employment Agreements of Otto Marx, William D. Fugazy, Louis Fugazy, of October 10, 1967.

Collateral Agreement between FTB and Otto Marx of October 10, 1967.

Letter to the Fugazys from Marx & Co. of October 13, 1967.

Letter to Hays Sklar from Lee Toomey of October 26, 1967.

Letter to Bloomingdale from Marx of October 31, 1967.

Handwritten notes of Fugazy (re Fairmont Hotel meeting) of June 7, 1968.

Memo to files from William Fugazy of June 10, 1968.

Letter to Fugazy from Bloomingdale of June 13, 1968.

Memo to Faunce from W. Fugazy of June 23, 1969.

Agreement between Diners/Fugazy Travel and Otto Marx of October 1, 1968.

Memo from Bloomingdale to W. Fugazy of October 21, 1969.

Prelim. Agenda for Diners Bd. meeting with Fugazy handwritten notes of November 22, 1968.

Letter to Marx from Fugazy of December 4, 1968.

Letter to Johnson from Fugazy of December 23, 1968.

Letter to Fugazys from Marx of June 12, 1969.

Letter to Marx from Fugazy of July 21, 1969.

Memo of J. K. Lasser re FTB financial statement of September 30, 1962.

Letter to Marx from List with attachments of August 26, 1969.

Letter to Marx from W. Fugazy of January 26, 1970.

Letter to Fugazys from Marx of February 11, 1970.

Letter to Fugazys from Marx of January 20, 1970.

Letter to Fugazys from Marx of April 3, 1970.

Promissory Note of FTB to Marx & Co. of November 22, 1966.

Promissory Note from FTB to TCC of November 28, 1966.

Promissory Note from FTB to Marx & Co. of January 20, 1967.

Minutes of meeting of FTB franchise Dept. of May 15, 1967.

Letter to Diners from FTB by William Fugazy of October 10, 1967.

Memo to Bloomingdale from Marx with draft of tax opinion of September 12, 1967.

Letter to Bloomingdale from Marx of September 14, 1967.

Promissory Note from FTB to Otto Marx of November 10, 1967.

Memo to William Ward from William Fugazy of November 15, 1967.

Promissory Note from Ventures to Marx & Co. of April 23, 1968.

Letter to Marx and the Fugazys from William Fugazy of Diners Club of June 18, 1968.

Letter to Herd from Fugazy of March 20, 1969.

Pleadings and other papers filed in Ford v. Diners and Wirtz v. Diners.

Letter to Marx from Mandel of April 14, 1969.

Memo to Faunce from Flug of May 13, 1969.

Memo to Faunce from W. Fugazy of June 23, 1969.

Letter to Marx from Fugazy of April 14, 1970.

Acknowledgment of debt by Fugazys to Marx & Co. of August 15, 1970.

Pleadings and papers filed in FTB v. Ernst & Ernst.

Promissory Note from FTB to TCC of August 22, 1967.

Fugazy Travel Bureau memorandum of understanding of May 31, 1966.

Memo to Bloomingdale from W. Fugazy of October 21, 1969.

Memo to Marx from Fugazy of September 11, 1967.

Letter to Giegel at Lee Toomey from Otto Marx of September 19, 1967.

Summons and complaint of Marx v. Fugazy of August 24, 1970.

Affidavit of Confession of Judgment of William and Louis Fugazy of August, 1970.

Letter to Herd from Fugazy of November 14, 1969.

Memo handwritten by Otto Marx of December 11, 1969.

Memo from W. Fugazy to Bloomingdale of February 28, 1969.

Memo to Fugazy from Phillips of August 6, 1968.

Memo to Bloomingdale from Fugazy of August 30, 1968.

Memo to Hays from Fugazy of August 23, 1968.

Letter to Fruchtman from Fugazy of October 14, 1969.

Documents marked as exhibits in depositions conducted in this action.

Letter to Diners Directors et al. from Faunce of September 9, 1969.

Report on Diners/Fugazy Travel to Bloomingdale from Fugazy of November 10, 1969.

Memo from Phillips to the Fugazys and Marx of June 10, 1968.

Financial Statements and Books of Account of Diners and Diners World Travel.

Assignment by Ventures to Louis Fugazy of January 1968.

The Phillips projections of 1967.

Assignment by Ventures to William Fugazy of January 16, 1968.

Documents listed in Defendants' Interrogatory Answers.

Minutes of Diners Board of Directors meetings.

Letter to the Fugazys and Marx from Diners Club of October 10, 1967.

Letter to Fugazy Travel Bureau (Del.) from Lee Toomey and Kent of October 17, 1967.

Transcripts from all depositions taken in this case.

Pleadings and Proceedings in this action.

Financial statements and books of account, and analyses thereof, of Fugazy Travel Bureau.

Newspaper and magazine articles relating to Fugazy Travel Bureau, Diners' Club and Continental.

Documents relating to the adjustment of the financial statements after the sale in October 1967.

Phillips' projections for the franchise program.

The May 1967 "Fugazy Report" agreement between Fugazy Travel Bureau and Travelco, Inc. of June 19, 1967.

Certificate of Incorporation and other corporate documents of Travelco, Inc.

Agreement between Travelco and Fugazy Travel Bureau of June 22, 1967.

Agreement between Fruchtman, Louis and William Fugazy of August 1, 1967.

Memorandum from Otto Marx to William Fugazy of December 13, 1967.

Documentation of Victor Herd's whereabouts on the weekend of November 22, 1968.

Letter to Herd from Fugazy dated October 1, 1968.

Letter to Iacocca from Fugazy dated October 4, 1968 with attachment.

Memorandum to Durkin from Bloomingdale dated February 24, 1969 with attachment.

Memo to file from Jules Asch dated November 27, 1968.

Outline of commitment agreement from Jules Asch dated 12/9/68.

Memorandum to Diners' Club Finance Committee from Jules Asch dated November 11, 1968.

Letter to Fruchtman from Milton Adler dated October 4, 1967.

Memorandum to Bloomingdale, et al from William Fugazy dated 10/31/68 with attachment.

Memorandum to Carmen Rodriguez from Milton Adler dated November 22, 1967 with attachments.

Memorandum to Carmen Rodriguez from William Fugazy dated November 21, 1967 with attachments.

Minutes of operating committee meeting of Diners Fugazy Travel dated November 21, 1968.

Letter to Alfred Bloomingdale from William Fugazy dated August 30, 1967.

M. TRIAL COUNSEL

1. The Marx plaintiffs designate Harris & Fredericks by Barry I. Fredericks, as trial counsel.

2. The Fugazy plaintiffs designate Harris & Fredericks by Barry I. Fredericks, as trial counsel.

3. The defendants designate Hardee Barovick Konecky & Braun, by Joseph J. Santora and Robert B. McKay, as trial counsel.

N. ESTIMATED LENGTH OF TIME OF TRIAL

This matter is to be tried by a jury. Trial counsel for all plaintiffs and all defendants estimate that the matter will take approximately sixteen days to be tried.

O. PLEADINGS

The amended answer to the amended Marx complaint shall be deemed to conform to the answer to the Fugazy complaint.

Dated: February 13 1975

SO ORDERED:

U. S. D. J.

AGREED AND CONSENTED:

HARRIS & FREDERICKS

By /s/ ALICE DONENFELD

Attorneys for Plaintiffs

HARDEE BAROVICK KONECKY & BRAUN

By /s/ JOSEPH J. SANTORA

Attorneys for Defendants

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A-77

Stipulation and Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

MARX & CO., INC., et al.,

Plaintiffs,

-against- CONSOLIDATED ACTION

THE DINERS' CLUB, INC., et al.,

Defendants, 70 Civ. 3064

F. T. VENTURES, INC., Additional (Knapp, J.)
Defendant on the Counterclaims,

WILLIAM D. FUGAZY and LOUIS V.
FUGAZY, Third Party Defendants.

----------X

----------X STIPULATION

WILLIAM D. FUGAZY and LOUIS V.
FUGAZY,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

MARX & CO., INC., et al., Additional
Defendants on the Counterclaims.

----------X

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for all parties, that the pre-trial order in the above captioned action dated February 13, 1975

is hereby amended to delete paragraphs 11 and 12 on pages 9 and 11 of said order.

Dated: March 12, 1975

HARRIS & FREDERICKS

By _____
Attorneys for Plaintiffs and
Counterclaim Defendants

HARDEE BAROVICK KONECKY & BRAUN

By _____
Attorneys for Defendants

SO ORDERED:

_____
U. S. D. J.

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filed 5/29/75

Statement of Ultimate Issues in the Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

MARX & CO., INC., et al.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

F. T. VENTURES, INC., Additional Defendant on the Counterclaims,

WILLIAM D. FUGAZY and LOUIS V. FUGAZY, Third Party Defendants.

- -x

- -x

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

MARX & CO., INC., et al., Additional Defendants on the Counterclaims.

- -x

70 Civ. 3064
(Knapp, J.)

CONSOLIDATED ACTION

STATEMENT OF ULTIMATE ISSUES IN THE CASE

The parties set forth the following as their joint statement of the ultimate issues involved in this consolidated action:

A. PLAINTIFFS' CLAIM

1. Whether liability under Section 10b and Rule 10b-5 of the Securities Exchange Act of 1934 ("Rule 10b-5") may be imposed against any of the defendants in favor of any of the plaintiffs if each plaintiff is able to prove the following factual allegations: that between 1967 and 1970, defendants continually told plaintiffs that defendant Diners Club was to be "taken over" by defendant Continental Insurance Company or Continental Corporation; that said representations were untrue when made and were known by the defendants to be untrue; that defendants intended to mislead plaintiffs and that plaintiffs were misled by said representations and in sole reliance thereon, plaintiffs acquired and retained Diners Club stock in return for transferring the assets of Fugazy Travel Bureau and in return for giving up benefits under their employment agreements; that defendants intentionally drove down the earnings of Diners Club in order to depress the value of Diners club stock; and, as the sole and direct consequence of defendants' alleged improper acts, plaintiffs were required to sell their Diners Club stock at a depressed price.

2. Whether the failure to establish any one of the foregoing elements precludes liability from being established against the defendants under Rule 10b-5.

3. Whether one or more of the following facts, if established, likewise preclude plaintiffs from establishing

liability under Rule 10b-5:

(a) that plaintiffs were highly sophisticated business investors who, at best, were taking a calculated business risk entering into the transactions in question;

(b) that the defendants, at best, discussed with plaintiffs what might perhaps happen at some indefinite future date, rather than giving definite representations;

(c) that Continental Corporation, in the course of its business activities, in fact did make a tender offer to acquire all outstanding stock of Diners Club in February 1970;

(d) that the consideration received by plaintiffs on the transfers in question well exceeded the consideration given up by plaintiffs;

(e) that the decrease in value of the Diners Club stock that occurred was the result of general market and business conditions, and was not caused by the defendants;

(f) that the decrease in value of the Diners Club stock was the result of the improper handling of the business affairs of Diners and Diners Fugazy Travel by the plaintiffs for their own personal benefit, to the detriment of Diners and Diners Fugazy Travel;

(g) that plaintiffs were not fraudulently induced to retain their Diners Club stock since it was restricted letter stock which they were prevented from disposing of anyway;

(h) that the consideration received by plaintiffs in October 1967 (cash and Diners stock) exceeded the consideration given up by them (the assets of Fugazy Travel Bureau);

(i) that the plaintiffs gave up nothing in October 1968 when they received additional Diners stock, since the "benefits" given up by them were totally speculative;

(j) that the plaintiffs are barred from any recovery by virtue of their own fraud and unlawful activities;

(k) that the very terms of the agreements of October 1967 and October 1968 bar plaintiffs from recovering on the basis of any alleged representations not contained in said agreements;

(l) that plaintiffs were themselves responsible for all losses, if any, sustained by them;

(m) that, to the extent plaintiffs obtained any information on which they relied to retain their Diners stock, it was confidential inside information which they were estopped from utilizing in any transactions involving Diners' stock held by them.

4. Whether, if each plaintiff can establish that each defendant violated Rule 10b-5, they can prove that they suffered any damages as a result thereof, and, if so, what the measure of damages should be.

B. DEFENDANTS' COUNTERCLAIMS

5. Whether plaintiffs, in misrepresenting the financial condition of Fugazy Travel Bureau, Inc., acquired by the defendants in October, 1967, and in submitting false accounting and financial statements in connection therewith, and in misrepresenting the true condition and the viability of a travel agency franchise program developed and operated by plaintiffs, violated Rule 10b-5, entitling the defendants to damages as a result.

6. Whether plaintiffs breached certain provisions of the purchase agreement in October, 1967 wherein defendant Diners acquired Fugazy Travel Bureau, Inc. from plaintiffs, entitling said defendant to recover damages as a result.

7. Whether plaintiffs violated their fiduciary obligations as officers, directors and employees of defendants Diners and Diners Fugazy Travel, Inc. and committed a variety of fraudulent acts, entitling said defendants to recover the damages resulting to them from said violations.

8. If defendants establish that plaintiffs violated Rule 10b-5 or certain provisions of the purchase agreement of

October, 1967, or their fiduciary obligations as officers, directors and employees of the defendants Diners and Diners Fugazy Travel, Inc., what damages said defendants should be entitled to as a result.

9. Whether the failure to establish any one of the foregoing elements precludes liability from being established against the plaintiffs under Rule 10b-5.

10. Whether or not the following fact, if established, likewise precludes defendants from establishing liability under Rule 10b-5:

a) The defendants did not rely on any of the accounting and financial statements submitted by the plaintiffs.

Dated: March 12, 1975

HARDEE BAROVICK KONECKY & BRAUN

By _____
a member of the firm
Attorneys for Defendants

HARRIS & FREDERICKS

By _____
a member of the firm
Attorneys for All Other Parties

SO ORDERED:

_____
U.S.D.J.

Defendants' Request to Charge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

MARX & CO., INC., et al.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

WILLIAM D. FUGAZY, et ano.,

Third-Party Defendants.

Consolidated Case
72 Civ. 4324

70 Civ. 3064 (RJW)

- -x

WILLIAM D. FUGAZY, et ano.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

MARX & CO., INC., et al.,

Additional Defendants on the Counterclaims.

- -x

Defendants' Request

To Charge

1. If it appears to you that any witness in the trial of this action has willfully and knowingly testified falsely to any material fact in this case, then you may, if you wish, disregard that witness' entire testimony.

2. You are the sole judges of the facts of this case. There are claims in this case by the plaintiffs against the defendants and there are claims by the defendants against the plaintiffs. In order for either side to recover against the other, you must find by a fair preponderance of the evidence that certain facts have been established to your satisfaction. The plaintiffs claim that they were fraudulently induced to sell the assets of their company, Fugazy Travel Bureau, Inc., to the Diners' Club in 1967, to transfer the ongoing business of Fugazy Travel Bureau to the Diners' Club at that time and to enter into certain employment agreements at the same time. I have determined that the plaintiffs have failed to present enough evidence on that claim and I have, therefore, dismissed it.

3. I am leaving it up to you, the jury, to determine whether or not the plaintiffs have proved their second claim by a fair preponderance of the evidence. This does not mean that the plaintiffs have proved that claim, but simply that I am leaving it up to you to make that determination.

4. The plaintiffs claim in this regard is that they were fraudulently induced to give up certain rights they had to cash compensation under their employment agreements in 1968 in return for Diners' Club stock, that they did this in reliance upon representations they claim were made to them by the defendants that Continental Corporation or Continental Insurance Company was going to acquire or take-over the Diners' Club by November 1968, and that the effect of this was going to increase the value of the Diners' Club stock that they had received.

5. In order for you to return a verdict for the plaintiffs on this claim, you must find by a fair preponderance of the evidence that plaintiffs have established to your satisfaction that (a) prior to September 27, 1968, the defendants knowingly or in reckless disregard for the truth misrepresented to the plaintiffs that Continental was going to take-over Diners' before the end of November 1968 and that the take-over would result in a significant increase in the value of their Diners' shares, (b) a reasonable investor would attach importance to that statement in the circumstances in which it was made in determining whether or not to exchange a contingent right to cash compensation for additional shares of Diners' stock, the cancellation of his indebtedness, a release of certain tax liabilities, the payment of approximately

$240,000 and a limitation on other liabilities; and (c) that these plaintiffs in fact relied on those statements in making their decision. In this connection, you may want to consider that plaintiff Marx had been an investment banker for approximately thirty-five years and had significant experience in mergers, acquisitions, financings and other transactions involving securities and that plaintiff William Fugazy had also had long business experience and was, at the time of the receipt of those statements, the President and a director of the defendant Diners'. If you find that no such statements were made by the defendants to the plaintiffs prior to September 27, 1968, or that such statements, if made, were reasonable when made or were merely predictions or opinions, you may not return a verdict for the plaintiffs; even if you find that those statements were knowingly and willfully made by the defendants to the plaintiffs prior to that date, you may not return a verdict for the plaintiffs unless you also find that a reasonable investor would attach importance to them in determining whether or not to exchange his contingent cash compensation rights for the consideration referred to above; and finally, even if you find that those statements were knowingly and willfully made by defendants to the plaintiffs prior to that date and that a reasonable investor would attach importance to

them in determining whether or not to exchange his contingent cash compensation right for the consideration referred to above, you may not return a verdict for the plaintiffs unless you also find that these plaintiffs in fact relied on those statements in making their decision.

6. If you find to your satisfaction that the plaintiffs have established by a fair preponderance of the evidence all of the aforementioned elements of their claim, you must further find the extent to which the plaintiffs were damaged, if at all. For this type of claim, a plaintiff can recover only the difference between the value of what he gave up and the value of what he received. In determining the value of what the plaintiffs gave up, you may take into consideration that the contingent compensation payable to plaintiffs was subject to Diners' right to discontinue the sale of franchises at any time. You may also take into consideration that, in exchange for those contingent rights, the plaintiffs received 37,245 shares of the common stock of defendant Diners', then valued at approximately $1,862,250, the cancellation of an indebtedness to Diners' in the amount of $180,352, a release from certain tax liabilities, cash in the amount of approximately $243,000 and a limitation on other liabilities. You may also want to consider whether the plaintiffs received more than they would have received if they had not exchanged their right to contingent

cash compensation. If you find that the plaintiffs did receive as much as or more than they would have received had they not exchanged those rights, and, therefore, the plaintiffs were not damaged, you may not return a verdict for the plaintiffs.

7. The defendants also claim that, with respect to the shares of Diners common stock issued to them in 1967, defendant Diners, in violation of its contractual obligation to plaintiffs, did not promptly file a registration statement and thereafter did not use its best efforts to cause that registration statement to become effective.

8. In order for you to return a verdict for the plaintiffs on this claim, you must find that the plaintiffs have proved by a fair preponderance of the evidence that Diners unreasonably delayed the filing of the registration statement in 1969 and thereafter failed to use its best efforts to cause that registration statement to become effective. In this connection, you may take into consideration that, although the plaintiffs formally requested the registration of those shares on April 16, 1969, the plaintiffs, during the next approximately six to eight weeks, advanced a variety of proposals to avoid the necessity of filing a registration statement and that that may have resulted in a delay in the commencement of the preparation of the registration statement. You may also take into consideration that defendant Diners had the right to, and did, include in the registration statement other securities and that, in

that connection, it was required to obtain information with respect to the holders of those securities, which may have resulted in a delay in the filing of the registration statement. You may also take into consideration that, notwithstanding that the plaintiffs were required as a condition precedent to the preparation of that registration statement, to advance to defendant Diners an amount sufficient to reimburse Diners for one-half of the expenses of that registration statement, the plaintiffs never made any such payment. You may also take into consideration that, notwithstanding that the plaintiffs were required as a condition precedent to the preparation of that registration statement, to execute an indemnity agreement, the plaintiffs refused to executed the indemnity agreement until August 24, 1969. You may also take into consideration in determining whether or not defendant Diners used its best efforts to cause the registration statement to become effective that comments from the Securities and Exchange Commission with respect to the registration statement were not received by Diners until approximately two months after the registration statement had been filed and that within two weeks thereafter defendant Diners had transmitted to the Securities and Exchange Commission two letters of response to those comments and had attended a conference with the staff of the Securities and Exchange Commission in Washington to resolve those comments and that, according to the testimony of Mr. William Fugazy, there were monumental problems involved in causing the registration statement to become effective.

9. The defendants' claim that, in connection with the acquisition by them of FTB in 1967 and the obligations undertaken in connection therewith, the plaintiffs made untrue statements of material facts, ommitted to state material facts, employed devices, schemes, and artifices to defraud and engaged in acts practices and a course of business which operated as a fraud and deceit upon the defendants.

10. In order for you to return a verdict for the defendants on this claim, you must find by a fair preponderance of the evidence that the defendants have established to your satisfaction that (a) the plaintiffs knowingly or in reckless disregard for the truth failed to disclose to Diners that (i) FTB was insolvent and had been for the four years perceding the acquisition by Diners, (ii) Otto Marx had instituted a fraud action against Tower Credit Corporation, the company from which he had acquired FTB, (iii) that fraud action was based upon false representations made to him by William Fugazy and Louis Fugazy in connection with Marx's acquisition of FTB, (iv) Tower Credit Corporation had claims against William Fugazy and Louis Fugazy arising out of misrepresentations made by them to Tower Credit Corporation in connection with the sale to Tower Credit Corporation of the predecessor company of FTB, (v) William Fugazy and Louis Fugazy had indemnified Tower Credit Corporation against any claims asserted against Tower Credit Corporation which were based upon the representations made by William

Fugazy and Louis Fugazy to Marx in connection with Marx's acquisition of FTB and (vi) as part of the settlement of that fraud action, Marx bargained for and obtained from Tower a release of any claims Tower had or could have against Marx and his companies, but Marx caused Tower to assign to him Tower's rights against the Fugazys under the indemnities in order to assure that no claims would be made on the indemnities at that time; or Marx knew that it was essential to prevent disclosure to Diners of the Fugazys' past conduct and transgressions, since such disclosure would obviously cause Diners to abandon a deal, premised on the Fugazy brothers' prior success and which contemplated continued operational control of the new entity by the Fugazy brothers; or misrepresented to Diners (i) that the plaintiffs had entered into an arms-length transaction for the sale of the 342 Madison Avenue office (which included the principal portion of the New York City business) when the actual sale was to a shell company owned, operated and controlled by the plaintiffs, which misrepresentation resulted in an overstatement of the net profits of FTB in 1967 by approximately $250,000, (ii) the value of the assets of Dial-A-Tour, a company acquired by FTB in 1967, since, among other things, the Dial-A-Tour receivables sold to Diners included substantial uncollectible receivables due from FTB franchises and the plaintiffs failed to reveal that Dial-A-Tour was consistently losing money even though they knew of this condition, (iii) that the franchise program formulated by them was viable when the plaintiffs knew, from their

own experiences, that the obligations of the franchisees were so burdensome that it was not possible for the franchise system to work and, knowing this, the plaintiffs actually instituted a policy not to have the franchisees make the required payments in order to perpetuate the franchises until a sale of FTB could be effected or (iv) that the liabilities stated in the financial statements certified by Messrs. Marx, William Fugazy and Robert Phillips were true and correct when they knew that liabilities were understated and therefore the profits for the nine month period ending June 30, 1967 were overstated by at least $250,000.

(c) a reasonable investor would attach importance to those misrepresentations and ommissions in the circumstances in which they were made in determining whether or not to acquire FTB and to undertake the obligations in connection therewith; and (d) that a reasonable investor would attach importance to those ommissions, that the plaintiffs engaged in a comprehensive scheme to defraud the defendants or that these defendants in fact relied on those misrepresentations in making their decision. In this connection, you may take into consideration the evidence in this case concerning the condition of FTB at the time it was sold to defendant Diners, the viability of the franchise program developed by the plaintiffs, the interests of the plaintiffs in the franchise office at 342 Madison Avenue, and the misrepresentations by the plaintiffs Fugazy in the prior law suits by plaintiff Marx against Tower Credit Corp.

and Ernst & Ernst. If you find that no such misrepresentations or ommissions were made by the plaintiffs, or that such misrepresentations or ommissions, if made were reasonable when made, you may not return a verdict for the defendants; even if you find that those misrepresentations or ommissions were knowingly and willfully made by plaintiffs to defendants, you may not return a verdict for the defendants unless you also find that a reasonable investor would attach importance to them in determining whether or not to acquire FTB and to undertake the obligations in connection therewith; and finally, even if you find that those statements were knowingly and willfully made by the plaintiffs to the defendants and that a reasonable investor would attach importance to them in making his decision, you may not return a verdict for the defendants unless you also find that the plaintiffs engaged in a comprehensive scheme to defraud the defendants, that a reasonable investor would attach importance to the ommissions or that these defendants in fact relied on the plaintiffs' misrepresentations.

11. If you find to your satisfaction that the defendants have established by a fair preponderance of the evidence all of the aforementioned elements of their claim, you must further find the extent to which the defendants were damaged, if at all. For this type of claim the defendants can recover the difference between the value of what they gave up and the value of what they received. In determining the value of what the defendants gave up, you must take into consideration that the consideration transferred by the defendant Diners to the plaintiffs during the years 1967 and 1968 included approximately $4,220,260 worth of the shares

of the Diners common stock, at its then market value, and approximately $2,500,000 in cash. You may also take into consideration that, in exchange for those securities and cash, the defendants received FTB, the franchise system to be operated by FTB and was obligated to, and did employ the plaintiffs. For this type of claim, the defendants can also recover the direct consequential damages suffered by them as a result of the plaintiffs violations. In determining the direct consequential damages suffered by defendant Diners, you may take into consideration that it lost $693,000 during the year ended March 31, 1969; $14,437,000 during the year ended March 31, 1970; $9,988,000 during the 9 months ended December 31, 1970; and $9,891,192 thereafter.

12. As to the defendants' second claim against the plaintiffs, defendants claim that the plaintiffs breached their fiduciary duties owed to Diners and Diners/Fugazy Travel by the plaintiffs in their capacities as officers and directors of those companies. A director or an officer of a corporation violates his duty of trust to that corporation is he does not give to that corporation his undivided and unqualified loyalty, if he allows his personal interests to conflict with the interests of the corporation or if he uses for his personal gain information obtained by him by virtue of his position with the corporation.

13. If you find that the plaintiffs or any of them made their decisions as to the number of franchises that were sold by Diners/Fugazy Travel on the basis of the personal benefits it

would yield to them, and not strictly on the basis of the best interests of the corporations, or if you find that the plaintiffs maintained a direct or indirect interest in the franchise office at 342 Madison Avenue during the time that they were officers and/or directors of Diners or any of its subsidiaries, or if you find that the plaintiffs diverted business or opportunities of Diners or any of its subsidiaries to any other entity for their own personal gain, or if you find that the plaintiffs concealed or willfully or recklessly failed to disclose to Diners or any of its subsidiaries, during the time plaintiffs were officers and/or directors of Diners or its subsidiaries, any information relating to the business or affairs of Diners or any of its subsidiaries which, if known to Diners, might have resulted in increased earnings or decreased losses for Diners or any of its subsidiaries, you may return a verdict for the defendants on their claim for breach by the plaintiffs of their fiduciary duties.

14. If you find to your satisfaction that the defendants have established by a fair preponderance of the evidence that the plaintiffs breached their fiduciary duties to defendants Diners and Diners/Fugazy Travel, you must further find the extent to which the defendants were damaged. For this type of claim, the plaintiffs would be liable to the defendants Diners and Diners/Fugazy Travel for any and all of the profits received by the plaintiffs that flow from the plaintiffs violations of their fiduciary duties, for

all losses suffered by Diners and Diners/Fugazy Travel as a result of those breaches and for any and all compensation received by plaintiffs from Diners and Diners/Fugazy Travel. In determining such damages, you may take into consideration that Diners/Fugazy Travel suffered losses in the amount of approximately $35,009,192; that the defendant Diners paid to the plaintiffs in the aggregate of approximately $100,000 in salaries and $743,750 in franchise fee compensation; and that Diners issued to the plaintiffs in exchange for the plaintiffs cash compensation rights shares of Diners common stock then valued at $1,862,300.

15. In determining the merits of the plaintiffs' claims and the defendants' claims, you should not let your consideration of the merits of these claims be influenced by which parties first asserted the claims against the other.

Respectfully submitted,

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Plaintiffs' Trial Memorandum
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al., Plaintiffs,	:	
-against-	:	70 Civ. 3064 (Ward, J.)
THE DINERS' CLUB, INC., et al., Defendants,	:	CONSOLIDATED ACTION
F. T. VENTURES, INC., Additional Defendant on the Counterclaims,	:	
WILLIAM D. FUGAZY and LOUIS V. FUGAZY, Third-Party Defendants.	:	
WILLIAM D. FUGAZY and LOUIS V. FUGAZY, Plaintiffs,	:	
-against-	:	
THE DINERS' CLUB, INC., et al., Defendants,	:	
MARX & CO., INC., et al., Additional Defendants on the Counterclaims.	:	

PLAINTIFFS' TRIAL MEMORANDUM

Preliminary Statement

Plaintiffs Marx & Co., Otto Marx, Jr., John V. Summerlin, Jr., William D. Fugazy and Louis V. Fugazy, owned

outright and beneficially Fugazy Travel Bureau, Inc. ("Fugazy Travel"). The issues to be decided in the trial of these two cases, which have been consolidated for all purposes, arise out of the sale by plaintiffs on October 30, 1967 of substantially all of the assets of Fugazy Travel to The Diners' Club, Inc. ("Diners").

Plaintiffs intend to prove at trial that defendant Diners, Diners/Fugazy Travel, Inc. ("Diners/Fugazy"),* The Continental Corporation ("Continental") and The Continental Insurance Company ("Continental Insurance"), in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, engaged in a scheme during the period from on or about July 1967 to February 6, 1970 to defraud the plaintiffs. As will be set forth in detail in the "Statement of Plaintiffs' Claims," defendants conspired to induce plaintiffs to agree to the acquisition of Fugazy Travel by Diners by knowingly misrepresenting that Diners would be acquired by Continental. Plaintiffs Otto Marx, Jr., William D. Fugazy and Louis V. Fugazy further claim that defendants, again in violation of Section 10(b) of the 1934 Act and Rule 10b-5, knowingly

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* Diners/Fugazy was a wholly-owned subsidiary of Diners created pursuant to the acquisition of Fugazy Travel by Diners.

misrepresented that Diners would be acquired by Continental in order to induce plaintiffs Marx, William Fugazy and Louis Fugazy to agree to an amendment of their employment agreements with Diners/Fugazy whereby said plaintiffs gave up the substantial cash compensation they were to receive under their employment agreements in exchange for additional shares of Diners' Common Stock. Plaintiffs will also show that defendants, in breach of their obligation pursuant to the acquisition agreement between Diners and Fugazy Travel, failed to promptly file a registration statement for the sale to the public of plaintiffs' restricted shares of Diners' Common Stock and failed to use their best efforts to cause said registration statement to become effective.

As a result of the acts of the defendants, plaintiffs seek damages as follows:

(a) With respect to Diners' stock acquired in consideration for the sale of Fugazy Travel to Diners':

1. Marx & Co.	--	$ 527,150
2. John Summerlin, Jr.	--	123,263
3. William Fugazy	--	308,156
4. Louis Fugazy	--	308,156
Total Loss on Acquisition Shares	--	$1,266,725

(b) With respect to Diners' stock acquired in consideration for the amendment of the employment

agreements by which the cash compensation was relinquished:

1.	Otto Marx, Jr.	-- $ 763,543
2.	William Fugazy	-- 381,751
3.	Louis Fugazy	-- 381,751
Total Loss on Employment Shares		-- $1,527,045
TOTAL LOSS		-- $2,793,770

Statement of Plaintiffs' Claims

A. Acquisition of Fugazy Travel by Diners

The fraud perpetrated on plaintiffs began with the discussions and negotiations between plaintiffs and Diners concerning an acquisition of Fugazy Travel by Diners. The actual discussions commenced in June 1967 when A. Mitchell Liftig, acting on behalf of Diners, contacted William Fugazy, president of Fugazy Travel, and Otto Marx, Jr., chairman of the board of Fugazy Travel, to discuss with them the possible acquisition of Fugazy Travel by Diners. Fugazy Travel was a closely-held corporation, owned by the plaintiffs.

Marx and Fugazy were not interested in pursuing the matter until Liftig began making representations concerning Continental's involvement with Diners and plans Continental had for Diners. Marx and Fugazy informed Liftig that they were hesitant about an acquisition of Fugazy Travel

by Diners because they had doubts concerning Diners' financial stability and wherewithal to make the acquisition worthwhile to plaintiffs. Liftig responded by making further reference to Continental's involvement in Diners.

Continental had begun investing in Diners in late 1966 and by June 1967, was already a substantial stockholder of Diners and, in fact, Continental's president and chairman of the board, J. Victor Herd, was elected to the board of directors of Diners in 1967. Moreover, beginning on March 31, 1967, Continental began a program of debt financing of Diners in the form of convertible debentures and convertible preferred stock, which increased Continental's influence on Diners and Diners' dependence on Continental.

On the basis of Liftig's representations concerning Continental, William Fugazy, with the concurrence of Otto Marx, Jr., agreed to meet with Alfred S. Bloomingdale, president and chairman of the board of Diners. Beginning in July 1967, William Fugazy had a number of meetings with Bloomingdale, some of which Marx attended. Marx and William Fugazy related their conversations with Bloomingdale to plaintiffs Louis Fugazy and Summerlin.

Marx was not in favor of the acquisition and stated to Diners that he would not agree to the acquisition unless he was convinced that Continental was going to take over

Diners. In response tc plaintiffs' continuing expressions of doubt, Bloomingdale continually represented to Marx and William Fugazy that Continental would take over Diners.*

Marx and William Fugazy relied upon this representation by Bloomingdale and, in their capacities as chairman of the board and president of Fugazy Travel, agreed to enter into a memorandum of intention on July 20, 1967 for the acquisition of Fugazy Travel by Diners. That memorandum of intention set forth the basic terms of the acquisition, which was planned for the fall of 1967. The parties, however, were not obligated to go through with the acquisition until the actual acquisition agreement was executed.

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* Continental eventually did acquire substantially all of the stock of Diners. Continental on February 6, 1970 made a tender offer for Diners' Common Stock at $15 per share. As a result of this tender offer, Continental acquired 88% of Diners' Common Stock. The Continental takeover in February 1970 was not the takeover discussed between plaintiffs and Diners which plaintiffs relied upon in making their decision to agree to an acquisition of Fugazy Travel by Diners. Diners had represented that the Continental takeover would result in an appreciation of the value of the Diners' stock acquired by plaintiffs, as demonstrated in memoranda prepared by Diners and Continental which will be discussed later in this memorandum. At the time of the acquisition, Diners' stock was trading on the New York Stock Exchange at $36.625 per share. Plaintiffs William Fugazy, Louis Fugazy and John Summerlin, Jr. surrendered their stock to Continental at $15 per share and plaintiff Marx & Co. sold its stock in a private transaction at $13.50 per share. Obviously, they would not have made a deal with Diners if they had known that Continental's purchase of Diners' stock would be at a price below that at which they acquired Diners' stock.

The representations on the part of Diners concerning a takeover of Diners by Continental continued through the remainder of the summer of 1967. Bloomingdale, in his capacity as chief executive officer of Diners, continually represented to and reassured Marx and William Fugazy that the Continental takeover would occur. On several occasions he advised Marx and Fugazy that he had met with Victor Herd, president and chairman of the board of Continental, and Harold Johnson, executive vice president of Continental, and that the takeover of Diners by Continental was proceeding on schedule.

The plaintiffs, convinced by Bloomingdale that the Continental acquisition was going to take place, entered into the acquisition agreement that Bloomingdale had pushed so hard for. By the terms of the acquisition agreement, Fugazy Travel sold its assets to Diners in consideration principally for 57,000 shares of Diners' Common Stock and employment agreements for William Fugazy, Louis Fugazy and Otto Marx, Jr. The acquisition was closed on October 30, 1967; Diners' Common Stock closed on the New York Stock Exchange on October 30, 1967 at $36.625 per share.

The Continental takeover did not occur as represented by Diners and Continental, and plaintiffs were forced to eventually sell their shares of Diners' Common Stock

acquired pursuant to the acquisition of Fugazy Travel at substantially reduced prices. Plaintiff Marx & Co. sold the shares it acquired pursuant to the acquisition, 23,484 shares, for $13.50 per share; plaintiff Summerlin sold the shares he acquired, 5,871 shares, for $15.00 per share; and plaintiffs William and Louis Fugazy sold the shares of Diners' stock that they acquired pursuant to the acquisition, 29,355 shares, for $15.00 per share.

B. Amended Employment Agreements

As part of the acquisition, employment agreements were entered into between Diners/Fugazy and William Fugazy, Louis Fugazy and Otto Marx, Jr. Each of the employment agreements contained a percentage compensation provision. The percentage compensation term in the employment agreements of William Fugazy and Louis Fugazy provided for percentage compensation for 15 years at the rate of 10% of initial franchise fees received by Diners/Fugazy from the grant of new franchises during each fiscal year or shorter period or 8-1/3% of the net profits of Diners/Fugazy for each year, whichever was greater. The percentage compensation was limited to an aggregate dollar limitation of $1,250,000 and a periodic limitation of $125,000.

The percentage compensation term in Marx's employment agreement provided for percentage compensation for 15 years at the rate of 20% of initial franchise fees received by Diners/Fugazy from the grant of new franchises during each fiscal year or shorter period or 16-2/3% of the net profits of Diners/Fugazy for each year, whichever was greater. Percentage compensation for Marx was limited to an aggregate dollar limitation of $2,500,000 and a periodic limitation of $250,000. Thus, the total percentage compensation that William Fugazy, Louis Fugazy and Marx could receive was $5,000,000 in the aggregate and $500,000 in any one year.

In the spring of 1968, Diners approached William Fugazy and Marx to discuss the elimination of the cash compensation provision under the employment agreements in return for additional Diners' stock. Under the terms of the employment agreements, William Fugazy, Louis Fugazy and Marx received the $500,000 maximum yearly compensation as soon as it was earned. By the spring of 1968, because of Diners' rapid sale of franchises, the Fugazys and Marx had already earned their maximum cash compensation for that period. Diners wanted to eliminate the cash compensation because of its adverse impact on its earnings.

In these negotiations concerning the elimination

of the cash compensation, Marx told Bloomingdale that he would not give up the cash compensation unless he was assured of the Continental takeover. In response, Bloomingdale, determined to have the employment agreements amended, continually assured Marx that Continental would take over Diners, before the end of the year, at a price of approximately $60.00 per share.

Bloomingdale also made the same representations to William Fugazy. In addition to the representations made by Bloomingdale, Continental's president and chairman of the board, J. Victor Herd, in the spring of 1968, represented to William Fugazy that Continental would be acquiring Diners within the foreseeable future. William Fugazy, in turn, informed Louis Fugazy and Marx of these representations by Diners and Continental.

On June 8, 1968, Herd, Bloomingdale and William Fugazy met at the Fairmont Hotel in San Francisco to establish a timetable for the Continental takeover of Diners. At this meeting, representations were made by both Herd, on behalf of Continental, and Bloomingdle, on behalf of Diners, to William Fugazy, who by then was president of Diners, that the acquisition of Diners by Continental would occur in the late fall. At the meeting, Herd authorized representatives of Diners and Continental to sit down and negotiate the

terms of the acquisition. William Fugazy told Marx about this meeting with Herd and Bloomingdale and that Herd had set a timetable for the takeover.*

Throughout 1968, Continental continued to increase its debt financing of Diners and its control and influence over Diners. Between January 1, 1968 and October 1, 1968, the date that the employment agreements were amended, Continental purchased from Diners convertible debentures in the aggregate principal amount of $10,000,000. In addition, on December 23, 1968, Diners sold to Continental additional

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* Herd testified in his deposition that he did not meet with William Fugazy and Bloomingdale at the Fairmont Hotel in San Francisco:

> "Q. Will you state whether or not you ever had a meeting with Mr. Fugazy and Mr. Bloomingdale at the Fairmont Hotel in San Francisco?
>
> A. I could almost categorically say that I had not met them, either of them in San Francisco at any time under any circumstances.
>
> Q. You have no recollection of having met with Mr. Bloomingdale and Mr. Fugazy at the Fairmont Hotel in San Francisco in June, 1968?
>
> A. No." (Deposition of J. Victor Herd, January 28, 1972, pages 45-46).

Despite Mr. Herd's statement at his deposition, his own diary places Herd in San Francisco, at the Fairmont Hotel, on June 8, 1968. Moreover, Bloomingdale, during the course of his deposition, admitted that he met with William Fugazy and Herd at the Fairmont Hotel in San Francisco. (Deposition of Alfred S. Bloomingdale, January 20, 1971, page 11).

convertible debentures in the aggregate principal amount of $2,500,000. Plaintiffs were continually made aware of Continental's increasing position in Diners and were informed that this was but the prelude to Continental's complete takeover of Diners.

Continental's and Diners' charade of an imminent Continental takeover moved from oral representations to writings in August 1968. Herd authorized Harold Johnson, an executive vice president of Continental, to prepare with Jules T. Asch, executive vice president for finance of Diners, exchange ratios valuing Diners' stock vis-a-vis Continental's stock for the purported imminent takeover of Diners by Continental. Asch conferred with Johnson and prepared exchange ratio memoranda beginning in August 1968 through November 1968. As the price of Diners' stock changed, the exchange ratio memoranda were modified. These exchange ratio memoranda were discussed with and shown to Marx and William Fugazy and relied upon by William Fugazy, Louis Fugazy and Marx in their decision to relinquish their rights to cash compensation under their employment contracts.

Marx, though convinced by Bloomingdale's statements, Fugazy's meetings with Herd and the exchange ratios that the takeover was going to happen, wanted some written assurances that the Continental acquisition would be

completed by November 1968. He requested that the amendment of the employment agreements include a provision protecting him against the possibility that the acquisition would not take place as scheduled. Marx withdrew his request for written assurances when he was told by Diners that such a term could not be included because it presented SEC problems for Diners.

The continual representations by Continental and Diners that the Continental takeover was imminent bore fruit. For on October 1, 1968, William Fugazy, Marx and Louis Fugazy entered into the amended employment agreements, pursuant to which the cash compensation provisions were eliminated. In lieu of cash, Marx received 18,623 shares of Diners' Common Stock and each of the Fugazys received 9,311 shares. The closing price of Diners' Common Stock on the New York Stock Exchange on October 1, 1968 was $56.00 per share.

The takeover, according to the representations of Bloomingdale and Herd, was to be approved either at the October or November 1968 board meetings. Having induced the plaintiffs to give up their cash for Diners' paper on the strength of an imminent takeover, the defendants found no need to proceed with the takeover as scheduled. Herd directed that the takeover not be presented to the Diners' board for approval at that time.

Despite repeated assurances by Diners and Continental that the Continental takeover was imminent, by January 1970, Continental still had not acquired Diners.

In February 1970, when the market price of Diners' stock had fallen from $56.00 per share on October 1, 1968 to less than $15.00 per share, Continental made a tender offer for the outstanding shares of Diners' Common Stock at $15.00 per share. William Fugazy, Louis Fugazy and Marx, having been had, were forced to tender the shares of Diners' Common Stock that they received pursuant to their amended employment agreements to Continental. Marx, Louis Fugazy and William Fugazy sold the 37,245 shares to Continental for $15.00 per share, $41.00 per share less than the price that Diners' Common Stock was selling on the New York Stock Exchange on the day they were defrauded out of their cash compensation rights.

C. Failure to Register

The October 10, 1967 acquisition agreement whereby Diners acquired Fugazy Travel provided for the registration of the restricted stock issued to the Fugazy Travel shareholders.

Paragraph 10.2(b) of the acquisition agreement provided that if Diners did not file a registration statement in 1968, the Fugazy Travel shareholders could notify

Diners that they desired Diners to file a registration statement. Diners was obligated to promptly file a registration statement and to use its best efforts to cause the registration statement to become effective.

By letter dated April 16, 1969, Marx, on behalf of the Fugazy Travel shareholders, requested Diners to file a registration statement for the shares acquired by the Fugazy Travel shareholders at the time of the acquisition and the shares acquired by William Fugazy, Louis Fugazy and Marx in lieu of the cash compensation under their employment contracts.

Despite the representation by Diners in the acquisition agreement that it would "promptly file a registration statement," Diners did not file the registration statement until August 28, 1969, four and one-half months after the Fugazy Travel shareholders requested registration. In breach of its obligation "to use its best efforts to cause the registration statement to become effective," Diners filed a defective registration statement, which resulted in substantial comments by the SEC. Diners continued to drag its heels through the remainder of 1969 and the registration statement never became effective.

The Fugazy Travel shareholders, realizing the fraud that had been visited upon them by Diners and Continental

and realizing that the registration statement would never become effective, finally sold their stock at depressed prices.

Statement of Defendants' Counterclaims

Plaintiffs' claims are simple and straightforward. Defendants, however, have tried to confuse the issues in this case by belatedly introducing counterclaims which they know full well are without merit. Defendants charge fraud on the part of plaintiffs with respect to the acquisition of Fugazy Travel by Diners. Yet, defendants' counterclaims were not asserted until February 1971, three and one-half years after the acquisition, and were not asserted until de fants served their amended answer to the second amended com. int in the Marx & Co. action. Moreover, Diners made no mention of any claims it had against William Fugazy when he resigned in 1970 as a director of Diners and president of Diners/Fugazy to devote his full time to two divisions of Diners/Fugazy which were sold by Diners to a joint venture of General Leisure, Inc. and J. Walter Thompson Company. If defendants truly believed that they had a viable claim against plaintiffs, then they would have originated their own action prior to plaintiffs bringing their suit, or, at the very least, would have asserted their claims in their

initial answer to plaintiffs' complaint.

Defendants charge plaintiffs with violation of Section 10(b) of the Securities Exchange Act of 1934 by allegedly misrepresenting the true condition and viability of the travel agency franchise program and by misrepresenting the financial condition of Fugazy Travel. Defendants allege that these misrepresentations induced them to acquire Fugazy Travel, to enter into the employment agreements with William Fugazy, Louis Fugazy and Otto Marx, Jr., to agree to the amendment of the employment agreements and to operate the franchise system under the methods developed by plaintiffs. Defendants further claim that the foregoing acts constituted a breach by William Fugazy, Louis Fugazy and Marx of their fiduciary duties and obligations to Diners and Diners/Fugazy and a breach by plaintiffs of the acquisition agreement.

With respect to defendants' claim that misrepresentations were made by plaintiffs to induce defendants to agree to the acquisition and to enter into the employment contracts, nothing could be further from the truth.

In the first instance, the evidence will show that plaintiffs never attempted to induce defendants to acquire Fugazy Travel. It was the defendants who sought out the plaintiffs and pressured, persuaded, cajoled and induced them to sell. Moreover, by the terms of the acquisition

agreement, Diners' own auditors were authorized to conduct an investigation of Fugazy Travel's books and accounts. That investigation was conducted and no claim of fraud was made by Diners.

Pursuant to paragraph 1.3 of the acquisition agreement, the consideration paid by Diners for Fugazy Travel was to be adjusted after the closing to account for Fugazy Travel's operations for the period from June 30, 1967 to September 30, 1967. Fugazy Travel agreed to deliver a pro forma balance sheet of Fugazy Travel as of September 30, 1967, together with a schedule of current liabilities. Upon receipt of the balance sheet and schedule of current liabilities by Diners, Fugazy Travel agreed that the accounting firm of Touche, Ross, Bailey & Smart would perform a review of the books and accounts of Fugazy Travel on behalf of Diners. Touche, Ross was to prepare a report showing the assets, other than good will and investments in subsidiaries, and the current liabilities of Fugazy Travel as of September 30, 1967. That report, together with the supporting worksheets and schedules, was defined in the acquisition agreement as the "closing statement." The closing statement was to be binding and conclusive upon Fugazy Travel and Diners, unless Fugazy Travel or Diners objected to the amounts shown in the closing statement. If there were

objections, J. K. Lasser & Company, on behalf of Fugazy Travel, and Touche, Ross, on behalf of Diners, were to confer to arrive at an agreement on disputed items. If J. K. Lasser & Company and Touche, Ross could not agree, then Price, Waterhouse & Co. was to resolve any disputed items and Price, Waterhouse's determination was to be binding on the parties.

Touche, Ross did, in fact, conduct a review of the books and accounts of Fugazy Travel as of September 30, 1967 and by letter dated January 10, 1968, submitted its findings to Diners. Touche, Ross's review included, among other things:

a) discussions with the principal financial officers of Fugazy Travel;

b) a review of the systems for recording receipts, disbursements, sales and expenses;

c) a review of accounts receivable trade;

d) a review of the reasonableness of estimates of receivables due from franchises for royalties on sales (as part of this review, Touche, Ross reviewed franchise sales agreements); and

e) a review of notes receivable from sales of franchises by reviewing the contracts to

determine the reasonableness of the amount due, and the balance shown as current.

Based on its review, Touche, Ross stated that "there [was] question as to whether the accounting and internal control systems were sufficiently adequate to permit full reliance thereon." Moreover, Touche, Ross disclosed that losses were being incurred in the franchise system:

> "Our review of the unaudited financial statements of 18 franchises for various periods ending September 30, 1967 indicated that 15 franchises have a combined loss from operations of approximately $150,000 before deferral of start-up costs. We were unable to obtain financial statements for the period ended September 30, 1967 for any other franchises. Generally, the monthly financial statements of franchises have not been prepared on a current basis."

As a result of its review, Touche, Ross recommended adjustments to assets purchased and current liabilities of Fugazy Travel as of September 30, 1967. Touche, Ross recommended a reduction of $424,462 in assets purchased and a reduction in current liabilities of $125,843.

As a result of the Touche, Ross report and discussions between Diners and Fugazy Travel, adjustments were made to the cash portion of the consideration paid by Diners for Fugazy Travel. Fugazy Travel's cash consideration was reduced by $180,352, for which Diners took a 6% promissory note due March 15, 1971. That note was guaranteed by William Fugazy and Otto Marx, Jr.

Diners made no claim against plaintiffs with respect to its purchase of Fugazy Travel by Diners as a result of the Touche, Ross report and, in fact, the promissory note was cancelled as part of the consideration for Marx, William Fugazy and Louis Fugazy relinquishing their rights to cash compensation under their employment contracts. The counterclaims that defendants are now asserting are simply an eleventh hour ploy to obfuscate plaintiffs' claims and distract the court and jury from the real issues of the case.

The spuriousness of defendants' counterclaims was strikingly demonstrated by defendants' failure to assert claims over the shares held in escrow. Pursuant to the terms of the acquisition agreement, the shares of Diners' stock plaintiffs received for Fugazy Travel were placed in escrow pending:

(a) the non-collectibility of accounts receivable, notes receivable and investments in and advances to franchises of Fugazy Travel shown on the closing statement;

(b) any liabilities and obligations not assumed by Diners; and

(c) any and all damage or deficiency resulting from any misrepresentation, breach of warranty or non-fulfillment of any covenant

on the part of Fugazy Travel under the acquisition agreement or from any misrepresentation or omission contained in any document furnished pursuant to the acquisition agreement.

In addition to the escrow shares, $200,000 was placed in a special reserve by plaintiffs to ensure their performance. All of the shares placed in escrow were released by defendants. On May 8, 1968, 31,600 shares were released as part of the post-closing adjustments. Between May 8, 1968 and September 27, 1968, 13,479 shares were released and by agreement dated September 27, 1968, the remaining 12,683 shares were released as part of the transaction whereby the rights of William Fugazy, Louis Fugazy and Marx to cash compensation were relinquished. Had defendants believed that they had claims against plaintiffs, they certainly would not have released the escrow shares.

In addition to the investigation by Touche, Ross, Diners' executives reviewed the entire travel franchise concept in depth. Diners' officers, including Bloomingdale, visited certain franchises prior to the acquisition to meet with the people running the franchises and to review their financials. Marx and William Fugazy also met with Diners' officials and discussed with them the franchise program, as well as all other aspects of Fugazy Travel's operations.

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With respect to the alleged fraud committed on the part of plaintiffs in the operation of Fugazy Travel after the acquisition, it is Diners and not the plaintiffs that must shoulder the responsibility for any difficulties that arose. Both Marx and William Fugazy advised Bloomingdale that he was operating Diners/Fugazy improperly; Bloomingdale rejected their advice and ran Diners/Fugazy as he saw fit.

Plaintiffs had a vested interest in the profitability of Diners by reason of their stock ownership in Diners. It would have made no sense for them to undermine the operation of Diners/Fugazy because Diners' earnings would thereby be adversely affected, resulting in a reduction in the value of their Diners' stock. William Fugazy, Louis Fugazy and Marx would not have given up their rights to cash compensation for Diners' stock if they sought to injure Diners. Thus, defendants' counterclaims fly in the face of logic and the facts.

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POINT I

UNDER THE LAW OF THE SECOND CIRCUIT, PLAINTIFFS' CLAIMS FOR VIOLATION OF SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 10b-5 PROMULGATED THEREUNDER MUST BE UPHELD

In order for a party to be able to recover under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, he must prove materiality, scienter, causation and damages. Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 121 (S.D.N.Y. 1974). These elements of a 10b-5 violation have been the subject of much discussion and interpretation by the courts. Under the present state of the law in the Second Circuit, these elements are present in this case and judgment should be entered in favor of plaintiffs.

Materiality

The standard of materiality was set forth by the Second Circuit in List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.), cert. denied, 382 U.S. 811 (1965). In List, the Second Circuit held a material fact to be one to which "a reasonable man would attach importance...in determining his choice of action in the transaction in question." See Jackson v. Oppenheim, CCH Fed. Sec. L. Rep. ¶ 94,894 (S.D. N.Y. 1974). Materiality has also been held to encompass

those "facts about a corporation's business which in reasonable and objective contemplation might affect the value of the corporation's stock or securities..." Kohler v. Kohler, 319 F.2d 634, 642 (7th Cir, 1963).

As the representation that Continental was going to acquire Diners was of paramount importance to plaintiffs in their assessment of Diners and the value of Diners' stock to them, a reasonable investor would similarly have considered the representation important in making his investment decision. Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-4 (1972); Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974); Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 374 (2d Cir. 1973); Pierre J. LeLandais & Co., Inc. v. MDS-Atron, Inc., CCH Fed. Sec. L. Rep. ¶ 94,930 (S.D.N.Y. 1974).

Scienter

The scienter requirement in a private action for damages for violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder in the Second Circuit is "something short of specific intent to defraud...and something more than 'mere' negligence... Knowledge of the fact that the representation created a false picture is enough." Republic Technology Fund, Inc. v. Lionel Corp., 483 F.2d 540, 551 (2d Cir. 1973), cert.

denied, 415 U.S. 918 (1974). See Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112 (S.D.N.Y. 1974).

The Second Circuit has specifically rejected the restrictive standard of "intent to defraud." Globus v. Law Research Service, Inc., 418 F.2d 1276 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970). The Second Circuit in Globus I stated:

> "The jury was told that before the appellants could be held liable to plaintiffs, it must conclude that appellants 'knew the statement was misleading or knew of the existence of facts which, if disclosed, would have shown it to be misleading.'... the trial judge refused to direct the jury that it must find appellants intended to defraud appellees before it determined that there was a violation of either of these sections.
>
> "[T]he trend is clearly away from enforcing a scienter requirement equal to the 'intent to defraud' required for common law fraud. Before there may be a violation of the securities acts there need not be present all of the same elements essential to a common law fraud.
>
> "Judge Mansfield's instruction satisfied the scienter requirement imposed by prior cases." 418 F.2d at 1290-91.

See Lanza V. Drexel & Co., 479 F.2d 1277, 1305-06 (2d Cir. 1973); Shemtob v. Shearson, Hammill & Co., 448 F.2d 442, 445 (2d Cir. 1971); Odette v. Shearson, Hammill & Co., Inc., CCH Fed. Sec. L. Rep. ¶ 95,038 (S.D.N.Y. March 24, 1975); Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378

F. Supp. 112 (S.D.N.Y. 1974); Matheson v. White Weld & Co., 53 F.R.D. 450, 452 (S.D.N.Y. 1971); 3 L. Loss, Securities Regulation 1776 (1961 ed.), 6 L. Loss (1969 Supp.) at 3884.

In the instant case, Diners knew that its representation concerning the Continental takeover created a false picture for plaintiffs. Diners, at the time of the acquisition of Fugazy Travel by it, and at the time that the employment agreements of William Fugazy, Louis Fugazy and Marx were amended to eliminate the cash compensation, knew that Continental had no present intention of acquiring Diners. Diners was so intent upon acquiring Fugazy Travel that it misrepresented the status of Continental's interest in Diners. Diners knew full well that plaintiffs would not enter into an agreement with it unless they were persuaded that the Continental takeover was in the offing and given assurances to that effect. Continental conspired with Diners and joined in Diners' misrepresentations because it had a substantial interest in Diners that it looked to appreciate.

There can be no question that Diners and Continental were aware of each other's intentions since Continental was a controlling shareholder of Diners, a main source of Diners' funds and a significant voice in Diners' policymaking by reason of its representation on Diners' board. It must be remembered that the representations by Diners and Continental

were made by the chief executive officers of both companies, who logically were closest to the alleged takeover. Republic Technology Fund, Inc. v. Lionel Corp., 483 F.2d 540, 551 (2d Cir. 1973), cert. denied, 415 U.S..918 (1974).

Causation

Plaintiffs in order to recover damages for a 10b-5 violation must also prove a causal relationship between the misrepresentations and the losses. In Globus v. Law Research Service, Inc., 418 F.2d 1276 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970), the Second Circuit stated with approval the District Court's instructions to the jury on causation:

> "...'the plaintiff is required to prove by a fair preponderance of the evidence that he or she suffered damages as a proximate result of the alleged misleading statements and purchase of stock in reliance on them. In other words, the plaintiff must show that the misleading statement or omission played a substantial part in bringing about or causing the damage suffered by him or her and that the damage was either a direct result or a reasonably foreseeable result of the misleading statement." 418 F.2d at 1291.

See Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974); Chasins v. Smith, Barney & Co., 438 F.2d 1167, 1172 (2d Cir. 1970); Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 797 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970); List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir.), cert. denied, 382 U.S. 811 (1965); Titan Group, Inc. v. Faggen, CCH Fed. Sec. L. Rep.

¶ 95,042 (S.D.N.Y. April 1, 1975).

In the instant case, plaintiffs would not have agreed to the acquisition of Fugazy Travel and would not have agreed to relinquish their cash compensation for Diners' Common Stock except for the repeated representation by defendants that Continental was going to take over Diners. As a result, plaintiffs suffered the damages for which they are seeking recovery. Thus, the requirement of causation is easily met in this case.

Damages

The measure of damages in a 10b-5 action is the "out-of-pocket" loss suffered by the plaintiff. This measure of damages is based on Section 28(a) of the Securities Exchange Act of 1934 which provides that "no person... shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of." The out-of-pocket loss is the difference between the value of what a party gave up and the value of what he received. The courts, however, will allow a defrauded seller to recover any profits that the buyer has made. The Second Circuit set forth this out-of-pocket loss rule of damages in Levine v. Seilon, Inc., 439 F.2d 328, 334 (2d Cir. 1971). See, Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Rochez Bros. v.

Rhoades, CCH Fed. Sec. L. Rep. ¶ 94,386 (3d Cir, 1974); Janigan v. Taylor, 344 F.2d 781 (1st Cir.), cert. denied, 382 U.S. 879 (1965); Estate Counseling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 303 F.2d 527 (10th Cir. 1962); Abrahamson v. Fleschner, CCH Fed. Sec. L. Rep. ¶ 95,028 (S.D.N.Y. March 4, 1975).

Later, in Zeller v. Bogue Electric Manufacturing Corp., 476 F.2d 795 (2d Cir, 1973), the Second Circuit held that the windfall profits rule applied to defrauded purchasers as well.

In the instant case, plaintiffs' out-of-pocket loss with respect to their acquisition shares was $1,266,725. Diners' Common Stock was selling on the New York Stock Exchange on October 30, 1967, the date of the acquisition of Fugazy Travel by Diners, at $36.625 per share. Plaintiffs received 57,000 shares of Diners' stock, valued at $36.625 per share, for Fugazy Travel. The total value of this stock, the consideration for the transaction, was $2,087,625. Marx & Co. received 22,800 shares of Diners' Common Stock pursuant to the acquisition; William and Louis Fugazy each received 14,250 shares; and Summerlin received 5,700 shares. The shares of Diners' Common Stock that Marx & Co. received had a value at the time of the acquisition of $835,050. The shares of Diners' Common Stock that William and Louis Fugazy

each received had a present value at the time of the acquisition of $521,906.25. The shares of Diners' Common Stock that Summerlin received had a value at the time of the acquisition of $208,762.50.

Marx & Co. sold its 22,800 shares in a private transaction in December 1969 for $13.50 per share, for a total amount of $307,800. Marx & Co.'s out-of-pocket loss, the difference between what he paid for the shares, $36.625 per share, and the price he sold the shares, $13.50 per share, was $23.125 per share, for a total loss of $527,150. William Fugazy sold his 14,250 shares at $15.00 per share, for a total amount of $213,750. William Fugazy's out-of-pocket loss, the difference between what he paid for the shares, $36.625 per share, and the price he sold the shares, $15.00 per share, was $21.625 per share, for a total loss of $308,156. Similarly, Louis Fugazy also lost $308,156 on the transaction. As for Summerlin, his out-of-pocket loss, the difference between what he paid for the shares, $36.625 per share, and the price he sold the shares, $15.00 per share, was $21.625 per share, for a total loss of $123,263.

William Fugazy, Louis Fugazy and Marx's total out-of-pocket loss with respect to their relinquishment of the cash compensation under their employment agreements for Diners' Common Stock was $1,527,045. Diners' Common Stock

was trading on the New York Stock Exchange on October 1, 1968, the day that Marx, William Fugazy and Louis Fugazy entered into the amended employment agreements, at $56.00 per share. Marx received 18,623 shares of Diners' stock which had a value on October 1, 1968 of $1,042,888. William and Louis Fugazy each received 9,311 shares of Diners' stock on October 1, 1968 which had a value on that date of $521,416.

Marx sold his 18,623 shares at $15.00 per share. Thus, his per share out-of-pocket loss, the difference between what he paid for the shares, $56.00 per share, and the price he sold the shares, $15.00 per share, was $41.00. His total loss was $763,543. William Fugazy also sold his shares for $15.00 per share. His per share out-of-pocket loss was also $41.00 per share and his total loss was $381,751. Louis Fugazy's total loss was also $381,751.

Thus, plaintiffs' total loss in selling Fugazy Travel and relinquishing their cash compensation was $2,793,770.*

* Plaintiffs' damages for failure to promptly file a registration statement and to use its best efforts to have the registration statement become effective would be determined under the law of damages for breach of contract. The object of the law in giving damages for breach of contract is to compensate or to indemnify the injured party, to put him in as good a position as he would have been had the breaching party abided by its agreement.

(footnote continued on next page)

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POINT II

DEFENDANTS DID NOT PROMPTLY FILE A REGISTRATION STATEMENT AND DID NOT USE THEIR "BEST EFFORTS" TO CAUSE THE REGISTRATION STATEMENT TO BECOME EFFECTIVE

By the terms of the acquisition agreement between Diners and Fugazy Travel, Diners agreed that if plaintiffs requested registration of their restricted Diners' Common Stock, Diners would promptly file a registration statement. By letter dated April 16, 1969, plaintiffs requested registration; yet, the registration statement was not filed until August 28, 1969, more than four months after Marx's request.

New York Water Service Corp. v. City of New York, 4 A.D.2d 209, 163 N.Y.S.2d 538 (1st Dep't 1957). Under this theory, plaintiffs are entitled to be put in the position that they would have been had defendants fully performed. Thus, if defendants had performed, defendants would have caused the registration statement to become effective and plaintiffs' shares could have been publicly traded. Assuming that had defendants used "best efforts" to cause the registration statement to become effective and assuming that the registration statement would have become effective within the normal period in fiscal 1970, i.e., 70 days, see Point II, infra, then the registration statement would have become effective on November 7, 1969. Diners' stock was trading on the New York Stock Exchange on November 7, 1969 at $21.625 per share. Since plaintiffs sought registration of 66,158 shares, they could be expected to have received $1,403,667 in the offering. Since they sold 42,674 shares at $15.00 per share and 23,484 shares at $13.50 per share, their loss was $473,523, i.e., the amount they would have received had defendants performed, less the amount received when they sold the stock.

Diners' delay in filing the registration statement constitutes a breach of its contractual obligation to promptly file a registration statement.

Diners, in addition, agreed to use its "best efforts" to cause the registration statement to become effective. The registration statement had not become effective by December 1969, when the plaintiffs sold a part of their holdings of Diners' stock and still had not become effective by February 6, 1970, when Continental made a tender offer for Diners' stock. Because plaintiffs were in need of cash to pay off loans with The Chase Manhattan Bank and because it was apparent that Diners never truly intended to have the registration statement become effective, plaintiffs sold their shares of Diners' stock. Diners did not use its best efforts to cause the registration statement to become effective and therefore breached its obligation under the acquisition agreement.

Diners filed its registration statement on August 28, 1969. As of February 6, 1970, the registration statement still had not become effective, more than 160 days after filing and, in fact, the registration statement never became effective. Although the time between filing and the effective date has varied through the years depending on the number of filings, the time period has never been over 100

days. In fiscal 1970, the average time between filing and the effective date was only 70 days. Securities and Exchange Commission, 36th Annual Report to Congress at 29 (1970). In fiscal 1969, the average time was 65 days. Securities and Exchange Commission, 35th Annual Report to Congress at 32 (1969). Similarly, the average time between filing and the effective date in 1968 was 44 days, in 1964, 1965 and 1967 it was 36 days and in 1966 it was 38 days. Even 1962, which caused the SEC substantial problems because of an unusually high number of filings combined with an unusually high proportion of filings by companies without previous registration experience, resulted in a time lag between filing and the effective date of only 78 days. See Kupferman v. Consolidated Research and Mfg. Co., CCH Fed. Sec. L. Rep. ¶ 91,197 at 93,951 (S.D.N.Y. 1962); L. Loss, I Securities Regulation, pages 275-76 (1961) and IV Securities Regulation, 2336-37 (1969).

The courts have uniformly held a party accountable for breach of its obligation under a contract to use its best efforts to cause the registration of shares.

The Second Circuit so held in Republic Technology Fund, Inc. v. Lionel Corp., 483 F.2d 540 (2d Cir. 1973), cert. denied, 415 U.S. 918 (1974). Republic Technology purchased 25,000 shares of unregistered common stock of

Hathaway Instruments, Inc. at a price of $20.75 a share. The contract for this purchase provided that if at any time after 12 months from the date of the contract, Republic Technology determined to register its Hathaway stock, Hathaway would use its best efforts to register the stock at Republic Technology's expense. On March 15, 1961, Republic Technology purchased 25,000 additional unregistered shares of Hathaway stock. Hathaway again contracted to use its best efforts to have the shares registered as part of a registration statement which it represented that it intended to file on or before May 15, 1961. Hathaway filed a registration statement on May 5, 1961, but on June 8, 1961, Hathaway asked the SEC for permission to withdraw the registration statement because of a pending merger with Lionel Corporation. The merger was completed in late October 1961 and Lionel succeeded to Hathaway's remaining obligations to plaintiffs. In addition, the merger agreement provided that Lionel would file a registration statement on or before October 15, 1961 covering plaintiffs' stock. Lionel did file its registration statement on September 28, 1961. Three amendments to the registration statement followed and the registration statement did not become effective until September 21, 1962, fifty-one weeks after the original filing.

The Second Circuit stated that the fifty-one week delay may have been an unreasonable length of time and thus a breach of contract by Lionel; the Second Circuit remanded to the District Court for a determination of that issue. In discussing this question, the Second Circuit took cognizance of expert testimony at trial to the effect that six to eight weeks was all that should have been necessary to effectuate the registration statement.

Similarly, in Robert L. Ferman & Co. v. General Magnaplate Corp., 33 F.R.D. 326 (D. N.J. 1963), the court granted plaintiff's motion for summary judgment for defendant's breach of its obligation to use its best efforts to cause the registration of shares under the Securities Act of 1933. Defendant's obligation to register did not arise unless defendant was unable to obtain an exemption from registration. Defendant contended that it used its best efforts to obtain an exemption from registration, but was unable to do so because plaintiff had engaged in conduct that precluded defendant from obtaining the exemption. Defendant argued that plaintiff's conduct which precluded defendant from obtaining the exemption removed any obligation on the part of defendant to cause the shares to be registered. The court rejected defendant's contention and stated:

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> "Defendant unconditionally agreed to use its best efforts to secure exemption of the subject stock at its own expense. Its efforts to secure exemption were unsuccessful, and exemption became impossible within the meaning of the Agreement. Its obligation to obtain registration in such event was not dependent upon the expense to which it was put in its futile efforts to secure exemption. It has refused to perform its supplemental undertaking.
>
> "... This refusal constitutes as a matter of law, a breach of defendant's obligation under section 12(c) of its Agreement with the plaintiff. Plaintiff is, therefore, entitled to recover from the defendant such damages, if any, which it may have sustained by reason of such breach." 33 F.R.D. at 331-32.

See Paragon Internat., N.V. v. Standard Plastics, Inc., 357 F. Supp. 88 (S.D.N.Y. 1973); Maratta v. Associated Sales Analysts, Inc., 19 A.D.2d 844, 244 N.Y.S.2d 742 (2d Dep't 1963); Benjamin v. Bernitron Corp., CCH Fed. Sec. L. Rep ¶ 93,003 (Sup. Ct. N.Y. Co. 1971), Bruce & Co. v. Simpson & Co., 40 Misc.2d 501, 243 N.Y.S.2d 503 (Sup. Ct. N.Y. Co. 1963).

The SEC has also been called upon to interpret the "best efforts" provision of a contract. In In the Matter of Pathe Industries, Investment Company Act Release No. 7054 (April 13, 1972), the SEC was requested to pass on the application of Pathe Industries for an exemption from Section 17(a) of the Investment Company Act of 1940. The issue was whether the terms, including consideration, of a

proposed transaction for the sale of warrants by an affiliated company to Pathe Industries, a registered company, were reasonable and fair so that an exemption from the prohibition against such transactions could be granted. The SEC determined that the affiliated company had breached its obligation to use its best efforts to cause the registration of prior warrants by entering into an acquisition which delayed the affiliated company for over 15 months from preparing its financial statements for inclusion in the registration statement and further found that the forbearance by the investment company from asserting a claim against the affiliated company was adequate consideration for the warrants.

Any question as to whether Diners met its obligation to "promptly file" a registration statement is easily dispelled. Plaintiffs requested registration on April 16, 1969; defendants waited until August 28, 1969 to file, four and one-half months later. The facts demonstrate, however, that Diners could have filed a registration statement by June 20, 1969. Pursuant to paragraph 10.2(b) of the acquisition agreement, defendants were not obligated to file a registration statement until they could include in the registration statement their regularly prepared year-end audited financial statements. On June 20, 1969, Diners disseminated

its proxy statement for that year to its shareholders. Accompanying Diners' proxy statement was its annual report for the year ended March 31, 1969; the annual report contained Diners' audited financial statements for the year ended March 31, 1969. Thus, if Diners was able to prepare an annual report by June 20, 1969 containing its year-end audited financial statements, query why did it take more than two additional months to prepare a registration statement? Interestingly, Diners failed to disclose the forthcoming registration of plaintiffs' shares in the proxy statement or as a "commitment" in the notes to its financial statement for the year ended March 31, 1969.*

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* There appears to be no case law interpreting promptly filed as used in the context of this case. "Promptly," however, has been construed to mean without unreasonable delay in a securities laws context. Salinger v. Ling-Temco-Vought, Inc., 324 F. Supp. 1006 (W.D. Pa. 1971). See Naftalin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 469 F.2d 1160 (8th Cir, 1972); Krelinger & Fernau v. Charles J. Webb Sons Co., 162 F. Supp. 695, 698 (E.D. Pa. 1957).

POINT III

DEFENDANTS' FRAUD CLAIMS MUST FAIL BECAUSE PLAINTIFFS MADE FULL DISCLOSURE AND THERE WAS NO MISREPRESENTATION OR OMISSION ON THE PART OF PLAINTIFFS

Diners charges fraud on the part of plaintiffs by alleging that plaintiffs failed to disclose the true condition and viability of the franchise program both before and after the acquisition of Fugazy Travel by Diners. As was set forth in detail in the "Statement of Defendants' Counterclaims," supra, the entire franchise operation was fully disclosed to defendants prior to the acquisition.

Marx and William Fugazy met with Diners' officials on numerous occasions prior to the acquisition and disclosed to them the entire franchise operation, as well as all other phases of Fugazy Travel's operation. Moreover, Diners' executives visited franchises with William Fugazy in order that Diners could get a first-hand look at the franchises before Diners entered into the acquisition agreement with Fugazy Travel.

In addition, Diners commissioned Touche, Ross, Bailey & Smart to review Fugazy Travel's books and accounts. That review included discussions with Fugazy Travel's financial people and an evaluation of the reasonableness of

amounts due from franchises for royalties on sales and notes receivable from sales of franchises.

As to any fraud committed by plaintiffs after the acquisition concerning the "viability" of the franchise system, plaintiffs did advise defendants that defendants were operating the franchise program improperly. Problems in the franchise operation arose from defendants' mismanagement of it and not from any misconduct on the part of plaintiffs.*

Obviously, one element of an action for fraud, whether under the common law or under the federal securities laws, is that there be a misrepresentation or omission. Since plaintiffs gave full disclosure, both before and after the acquisition, there was no misrepresentation or omission and defendants' fraud claims must therefore fail.

In Phillips v. Reynolds & Co., 294 F. Supp. 1249

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* Since defendants' losses from the operation of the franchises resulted from their own mismanagement rather than fraud on the part of plaintiffs, plaintiffs' actions cannot be said to have proximately caused defendants' losses. Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974); Chasins v. Smith, Barney & Co., 438 F.2d 1167, 1172 (2d Cir. 1970); Globus v. Law Research Service, Inc., 418 F.2d 1276 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970); Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 797 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970); List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir.), cert. denied, 382 U.S. 811 (1965).

(E.D. Pa. 1969), plaintiffs claimed that the defendant stockbroker failed to inform them that Strategic Materials Corporation, a company in which plaintiffs invested, was operating at a deficit. The court held that plaintiffs could not complain because there, in fact, had been disclosure of the deficit and as a result, defendants were held not to have violated Rule 10b-5 because there had been no material misrepresentation or nondisclosure.

Similarly, in Reed v. Riddle Airlines, 266 F.2d 314 (5th Cir. 1959), plaintiffs, who sold stock to defendants, sought to rescind the transaction on the ground that defendants failed to disclose that a third person was interested in purchasing the stock. The Fifth Circuit affirmed tne District Court's finding that plaintiffs knew that there was a market for the stock, which precluded plaintiffs from recovering on their 10b-5 claim.

And in Popkin v. Bishop, 464 F.2d 714 (2d Cir. 1972), the Second Circuit affirmed the District Court's dismissal of plaintiff's 10b-5 action arising out of a merger of Bell Intercontinental Corporation into The Equity Corporation on the ground that there had been disclosure of the merger ratios which were allegedly unfair and fraudulent and thus, there was no misrepresentation or omission. See also Dolgow v. Anderson, 53 F.R.D. 661 (E.D.N.Y. 1971),

aff'd, 464 F.2d 437 (2d Cir. 1972); Ruszkowski v. Hugh Johnson & Co., 302 F. Supp. 1371 (W.D.N.Y. 1969); Wolfson v. Blumberg, CCH Fed. Sec. L. Rep. ¶ 92,216 (S.D.N.Y. June 12, 1968).

Recently, this Court decided in Pollak v. Eastman Dillon, CCH Fed. Sec. L. Rep. ¶ 94,987 (S.D.N.Y. Feb. 18, 1975), that an independent investigation by an allegedly aggrieved party precludes recovery where that investigation discloses the misrepresentation or omission which forms the basis for a 10b-5 claim. In Pollak, plaintiff was a sophisticated investor -- by profession he was a security research analyst. Plaintiff contended that defendant failed to disclose certain material facts concerning a company whose stock plaintiff purchased from defendant. Plaintiff, however, discovered the facts on his own. Plaintiff interviewed executive officers of the company to determine whether he should retain the stock or dispose of it. He also reviewed in depth the company's issued reports and financials and attended company meetings in order to learn as much about the company as he could. In addition, he talked on the telephone on numerous occasions with the company's executive officers and public relations consultant. The court after relating these facts stated:

> "[T]he evidence shows that plaintiff, relying upon his conferences and meetings with management, the company-issued reports which he received, the movement of the stock's price which he continuously followed, and his own sophistication and expertise, was independently and personally policing his investment in Leasing to determine if and when he would dispose of his holdings in the stock.
>
> "From the foregoing, it is clear that defendant is no way liable for any loss suffered by plaintiff." ¶ 94,987 at 97,411.

Similarly, in the instant case, as was set forth in depth in the "Statement of Defendants' Counterclaims," defendants relied upon their own independent investigation by their executive officers and by their accountants, Touche, Ross, Bailey & Smart, in their decision to purchase Fugazy Travel. That report by Touche, Ross disclosed the facts concerning Fugazy Travel which form the gravamen of defendants' claim and as a result, defendants are precluded from recovery.

Conclusion

Based on the foregoing, it is respectfully submitted that defendants' counterclaims should be dismissed and plaintiffs be awarded damages as follows:

Marx & Co.	--	$527,150
Otto Marx, Jr.	--	$763,543
John Summerlin, Jr.	--	$123,263
William Fugazy	--	$689,907
Louis Fugazy	--	$689,907

May 5, 1975

Respectfully submitted,

HARRIS, FREDERICKS & KOROBKIN

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Of Counsel:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS' MEMORANDUM WITH RESPECT TO ADMISSIBILITY

MARX & CO., INC., et al.,

Plaintiffs,

- against -

THE DINERS' CLUB, INC., et al.,

Defendants,

- against -

WILLIAM D. FUGAZY, et ano.,

Third-Party Defendants.

Consolidated Case
72 Civ. 4324

70 Civ. 3064

WILLIAM D. FUGAZY, et ano.,

Plaintiffs,

- against -

THE DINERS' CLUB, INC., et al.,

Defendants.

- against -

MARX & CO., INC., et al.,

Additional Defendants on the Counterclaims.

PLAINTIFFS' MEMORANDUM WITH RESPECT TO THE ADMISSIBILITY OF FUGAZY TRAVEL BUREAU, INC. v. ERNST & ERNST AND FUGAZY TRAVEL BUREAU, INC. v. TOWER CREDIT CORP.

PLAINTIFFS' MEMORANDUM WITH RESPECT TO THE ADMISSIBILITY OF FUGAZY TRAVEL BUREAU, INC. v. ERNST & ERNST AND FUGAZY TRAVEL BUREAU, INC. v. TOWER CREDIT CORP.

This memorandum is submitted to acquaint the Court with the facts regarding two lawsuits, Fugazy Travel Bureau, Inc. v. Tower Credit Corp., (S.D.N.Y. 65 Civ. 2152) and Fugazy Travel Bureau, Inc. v. Ernst & Ernst, (Sup. Ct. N.Y.Co. Index No. 04387/68), about which the defendants have sought to inquire and to introduce documents during their cross-examination of Mr. William Fugazy. As this memorandum will demonstrate, these two lawsuits have no relevance to the issues in the instant case and are introduced solely to confuse the jury and prejudice plaintiffs' case.

As the Court required, defendants have produced those documents in their possession relating to these two lawsuits. Plaintiffs have reviewed these documents and have prepared an exhibit book to assist the Court in its review of the documents which relate to these two lawsuits. References to the exhibit book will be made as follows: "Exhibit Book Tab ___."

Facts

The Tower Credit Corp. and Ernst & Ernst lawsuits arise out of the acquisition of Fugazy Travel Bureau, Inc. ("Fugazy Travel Bureau") and related entities by Travelmarx, Inc. ("Travelmarx").

On or about February 15, 1963, an agreement was entered into between Tower Universal Corporation ("Tower"),* Travelmarx, Fugazy Travel Bureau and Otto Marx, Jr. ("Marx") for the sale of Fugazy Travel Bureau and related corporations by Tower to Travelmarx. (A copy of the purchase agreement is contained in the Exhibit Book Tab A). Tower was the sole stockholder of Fugazy Travel Bureau, having purchased Fugazy Travel Bureau from the Fugazy family in July 1961. In addition, Tower owned in conjunction with Fugazy Travel Bureau a number of other companies engaged in the travel agency business. The purchase agreement called for the sale by Tower to Travelmarx of Tower's interest in Fugazy Travel Bureau and the other travel companies, which were referred to in the purchase agreement as the "Fugazy Group."

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* Apparently, Tower Universal Corporation's name was subsequently changed to Tower Credit Corporation. Tower Universal and Tower Credit will be referred to in this memorandum as "Tower."

The purchase price for the Fugazy Group was $1,400.000 payable as follows:

a. $250,000 payable at the closing, which was held on February 28, 1963;

b. two promissory notes, each in the amount of $125,000, the first due one year from the closing, the second due two years from the closing, both of which were guaranteed by Marx; and

c. a promissory note in the amount of $900,000, secured by a pledge of all of the issued and outstanding shares of Fugazy Travel Bureau.

As part of the February 15, 1963 purchase agreement, Tower furnished to Travelmarx the combined balance sheet of the Fugazy Group Corporations as of September 30, 1962 and the combined statement of income and expense of the Fugazy Group for the year ended September 30, 1962. In addition, Tower furnished Travelmarx with the unaudited combined balance sheet of the Fugazy Group Corporations as of December 31, 1962 and the combined statement of income and expense for the three months ended December 31, 1962. Tower represented and warranted that these financial

statements were prepared in accordance with generally accepted accounting principles applied on a consistent basis and presented fairly on a combined basis the financial position of the corporations at the dates of the balance sheets and the results of their operations for the periods covered by the statements of income and expense.

On or about July 14, 1965, Fugazy Travel Bureau commenced an action against Tower for misrepresentation and breach of warranty with respect to the financial condition of the Fugazy Group.* (A copy of the complaint in the Tower action is contained in the Exhibit Book Tab B).** William Fugazy was not a plaintiff in the Tower action, as defendants seem to suggest, nor were any of the other plaintiffs in the instant case, Louis Fugazy, Otto Marx, John Summerlin and Marx & Co., plaintiffs in the Tower action.

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* The lawsuit was brought in the name of Fugazy Travel Bureau rather than Travelmarx because shortly after the acquisition of the Fugazy Group by Travelmarx, Travelmarx was consolidated into Fugazy Travel Bureau and Travelmarx, as a separate and distinct corporate entity, went out of existence.

** The complaint in the Tower action was introduced by the defendants at trial and marked for identification as "Defendants' Exhiibt L." Copies of the documents that defendants have sought to introduce are contained in the Exhibit Book.

Fugazy Travel Bureau, into which Travelmarx had been consolidated, alleged that the representations and warranties concerning the financial condition of the Fugazy Group were untrue in that the balance sheets overstated the net worth of the Fugazy Group and that the income statements overstated income. As a result, Fugazy Travel Bureau sought damages in the amount of $393,313.76.

On or about October 18, 1965, Tower filed its answer and asserted a counterclaim against Fugazy Travel Bureau, claiming breach of the purchase agreement. (A copy of the answer in the Tower action is contained in the Exhibit Book Tab C). Tower's counterclaim was solely against Fugazy Travel Bureau; Tower did not assert claims against William Fugazy or any of the other plaintiffs as additional defendants on the counterclaim or as third-party defendants. Thus, plaintiffs in the instant case were not parties in the Fugazy Travel Bureau, Inc. v. Tower Credit Corp. action.

Tower in its answer denied the material allegations of the complaint. In its counterclaim, Tower alleged that Fugazy Travel Bureau, i.e., Travelmarx, breached its contractual obligations under the purchase

agreement by not using its best efforts to have a Tower-designated person elected to the board of Fugazy Travel Bureau, by not giving notice of meetings of committees of the board and by not furnishing Fugazy Travel Bureau's yearly and interim financial statements as required. Travelmarx in the purchase agreement had agreed to use its best efforts to have a person designated by Tower elected to the board of Fugazy Travel Bureau and to give Tower notice of all meetings of the executive committee or any other committee of the board and to allow a representative of Tower to be present at the meetings. Travelmarx also agreed to provide yearly audited financial statements and interim unaudited quarterly statements to Tower. It was further agreed that the $900,000 promissory note would become due and payable immediately if there were a breach of any material covenant on the part of Travelmarx. As a result of these alleged breaches of the purchase agreement, Tower sought immediate payment on the promissory note.

The only other activity in the Tower case was the service and filing by Fugazy Travel Bureau, on or about December 17, 1965, of a reply to the counterclaim and, as will be discussed below, a final disposition of the case two years later, on or about September 12, 1967.

At this point, however, it is important to note that the Tower action was settled by the time of the acquisition of Fugazy Travel Bureau by Diners and therefore was not a pending action which had to be disclosed in the schedules to the acquisition agreement for the sale of Fugazy Travel Bureau to Diners.

The second lawsuit that defendants have sought to introduce at trial, Fugazy Travel Bureau, Inc. v. Ernst & Ernst, also was commenced in 1965, and was brought in the Supreme Court of the State of New York, County of New York. Again, not one of the plaintiffs in the instant case was a party in the Ernst & Ernst action.

Plaintiff in the Ernst & Ernst action charged that Ernst & Ernst's certification of the Fugazy Group's financial statements was fraudulent in that Ernst & Ernst was grossly negligent and reckless in its examination and audit of the financial condition of the Fugazy Group and that Ernst & Ernst, in certifying the September 30, 1962 financial statements of the Fugazy Group, did so without knowledge of the truth or falsity of the certi-

fication. Ernst & Ernst was Tower's independent certified accountants. Fugazy Travel Bureau alleged that in reliance on the certification it entered into the purchase agreement and consummated the transaction for a gross purchase price of $1,400,000. In its amended complaint, Fugazy Travel Bureau claimed damages in an undetermined amount against Ernst & Ernst for Ernst & Ernst's gross negligence and recklessness and its fraudulent certification of the Fugazy Group's financial statements as of September 30, 1962.

Plaintiff also sought recovery of legal fees from Ernst & Ernst in the sum of $81,893.12, which were incurred by Fugazy Travel Bureau in the prosecution of its claim against Tower because of Tower's misrepresentation of the financial condition of the Fugazy Group. (A copy of the amended complaint in the Ernst & Ernst action is contained in the Exhibit Book Tab D).

Defendant Ernst & Ernst in its answer denied the material allegations of the complaint and asserted a counterclaim in the amount of $51,964.70 for unpaid fees for accounting services rendered in connection with Ernst & Ernst's examination of the financial statements of the Fugazy Travel Group for the year ended September

30, 1962. (A copy of the answer in the Ernst & Ernst action is contained in the Exhibit Book Tab E). Defendant Ernst & Ernst did not bring in as additional defendants to the counterclaim or as third-party defendants either William Fugazy or any of the other plaintiffs in the action presently before this Court.

As required by the terms of the acquisition agreement for the sale of Fugazy Travel Bureau to Diners, the Ernst & Ernst action was disclosed in Schedule 9 to the acquisition agreement.

As part of the February 1963 acquisition of the Fugazy Group by Travelmarx, Fugazy Travel Bureau, William Fugazy and Louis Fugazy entered into an agreement with Tower. This agreement provided that William and Louis Fugazy would place in escrow 10,000 shares of Tower stock, which they had acquired in the sale of Fugazy Travel Bureau to Tower, as security for any claims which Tower might have against William Fugazy and Louis Fugazy with respect to the representations and warranties concerning the Fugazy Group that Tower made to Travelmarx. Louis and William Fugazy represented and warranted that the representations and warranties made by Tower to Travelmarx were true and correct and that Tower would suffer no loss, damage or expense as a result of its making these representations

and warranties. In this agreement, Tower released Fugazy Travel Bureau and William and Louis Fugazy from any and all claims which Tower might have against them with respect to representations and warranties contained in the July, 1961 agreement pursuant to which Tower acquired Fugazy Travel Bureau. In return, William Fugazy released Tower from any and all claims which he might have against Tower pursuant to his employment agreement with Tower. Defendants introduced this agreement at trial and the agreement was marked "Defendants' Exhibit J" for identification.

On July 7, 1967, the claims of Tower against Fugazy Travel Bureau, into which Travelmarx had been consolidated, were satisfied. Tower had filed a petition for reorganization in the United States District Court for the Middle District of Florida (M.D. Fla. Case No. 66-171-Bky.T.) and by order of the Florida District Court dated July 7, 1967, a settlement of the claims of Tower against Fugazy Travel Bureau were settled as follows:

a. that all claims of Tower against Fugazy Travel Bureau, Marx & Co. and Otto Marx on the $900,000 promissory note were to be released in consideration

for the payment by Fugazy Travel Bureau of $265,000 in cash;

b. that Fugazy Travel Bureau diligently press its claim against Ernst & Ernst;

c. that Fugazy Travel Bureau assign to Tower the first $35,000 of the proceeds it recovered in its suit against Ernst & Ernst; and

d. that Fugazy Travel Bureau enter into a stipulation discontinuing its action against Tower. (A copy of the Florida District Court's order is contained in the Exhibit Book Tab F).

On August 22, 1967, Tower, by its successor trustee in the proceedings for reorganization, assigned to Marx & Co. all claims which it had or might have had against William Fugazy and Louis Fugazy under or arising out of the February 15, 1963 agreement between William Fugazy, Louis Fugazy, Fugazy Travel Bureau and Tower and all rights of Tower to shares of stock of Tower owned by William Fugazy and Louis Fugazy and held by Tower as collateral security for the obligations of William Fugazy and Louis Fugazy under the February 15, 1963 agreement.

No claims have ever been asserted by Marx & Co. against William and Louis Fugazy arising out of the Tower transactions. Defendants introduced this assignment at trial which was marked "Defendants Exhibit K" for identification.

Argument

The acquisition by Travelmarx of Fugazy Travel Bureau from Tower, subsequent lawsuits arising out of that acquisition and the settlement of the Tower claims are irrelevant to the issues in the instant lawsuit and are introduced solely for their prejudicial effect.

Plaintiffs' claims are simple and straightforward. As has been demonstrated by William Fugazy's testimony and the documents introduced into evidence by plaintiffs, defendants, beginning in June 1967, conspired to defraud plaintiffs by inducing plaintiffs to sell to Diners Fugazy Travel Bureau in return for Diners' stock, by inducing William Fugazy, Louis Fugazy and Otto Marx to relinquish their cash compensation under their employment agreements with Diners for additional Diners' stock and by failing to promptly file a registration statement with the SEC and by failing to use their best efforts to cause the registration statement to become effective.

This entire scheme on the part of defendants commenced in June 1967 and continued through February 1970. The events defendants seek to introduce date back to February 1963, when Travelmarx acquired Fugazy

Travel Bureau and related entities from Tower. What that acquisition has to do with the instant lawsuit is beyond comprehension. Not only did that acquisition precede the events of the present lawsuit by some four years, but the principal parties to the 1963 acquisition were not parties to the acquisition of Fugazy Travel Bureau by Diners. Neither Travelmarx nor Tower are parties to this lawsuit.

The Tower and Ernst & Ernst suits are equally irrelevant. None of the parties in those suits are parties in the instant action. Moreover, the claims by Fugazy Travel Bureau in the Tower and Ernst & Ernst actions related to the 1962 financial statements of the Fugazy Group, the stock of which was totally owned by Tower. The 1962 financial statements of the Fugazy Group are not at issue in this case. Furthermore, the Fugazy Group is not synonymous with Fugazy Travel Bureau. By the time of the acquisition of Fugazy Travel Bureau by Diners, Fugazy Travel Bureau had divested itself of many of the entities that comprised the Fugazy Group.

Defendants' counterclaims in the Tower and Ernst & Ernst actions are so extraneous to the issues

in the instant action that their introduction in this case could serve no other purpose but to bury plaintiffs' case in a morass of irrelevancies. Tower complained that Fugazy Travel Bureau (Travelmarx) failed to use its best efforts to place a Tower-designated director on Fugazy Travel Bureau's board, failed to notify Tower of meetings of committees of the board and failed to furnish Tower with audited and interim financial statements. By what stretch of the imagination is that counterclaim relevant to the instant suit? The Ernst & Ernst counterclaim, for fees for accounting services, is equally irrelevant. Significantly, neither Tower nor Ernst & Ernst brought in William Fugazy or Louis Fugazy as additional defendants on the counterclaim or as third-party defendants.*

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* Courts are reluctant to becloud the issues in a case at trial by evidence relating to previous litigation involving the parties. In United States v. Pollack, 394 F.2d 922 (7th Cir. 1968), defendant sought to introduce at trial of a criminal case exhibits relating to the civil case. The trial judge, in denying defendant's request to introduce those exhibits, stated:

> "I don't think we can start dumping into the laps of the jury that whole civil case. This man and company have been litigating now, . . . for five years, and this [civil] trial lasted twenty-six days, and we can't incorporate that trial by reference to this trial." 394 F.2d at 926.

(Continued)

There is no question that the existence of the Ernst & Ernst lawsuit was disclosed to Diners. Pursuant to paragraph 2.17 of the acquisition agreement between Fugazy Travel Bureau and Diners, Fugazy Travel Bureau was obligated to set forth in a schedule to the acquisition agreement all suits, litigation, proceedings and governmental investigations to which Fugazy Travel Bureau was a party. In that schedule, Schedule 9, Fugazy Travel Bureau disclosed that Fugazy Travel Bureau, Inc. v. Ernst & Ernst was pending in the Supreme Court of the State of New York, County of New York, that it was a negligence action and that the amount in controversy was $167,205.71.

As for the Tower action, it had already been settled and thus was not a pending suit requiring disclosure. However, the Tower settlement was disclosed in the notes to Fugazy Travel Bureau's June 30, 1967 financial statements, which were part of the closing documents for the acquisition of Fugazy Travel Bureau

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The Court of Appeals affirmed because the issues and proceedings in the civil litigation would have to be considered in detail by the jury and "[s]uch an undertaking would have constituted a significant departure and might well have hopelessly confused the jury." Id.

by Diners. That note stated:

> "The Company and Subsidiaries were purchased by the present ownership in March 1963 from Tower Universal Corporation (subsequently Tower Credit Corporation, now in receivership) for $1,500,000 in cash and notes. As of the purchase date, the consolidated liabilities exceeded the tangible assets by $169,238. At that time the entire purchase price plus this excess was charged to Goodwill. On August 22, 1967, the unpaid balance of the notes of $900,000, was settled for $265,000 and the difference less costs reduced Goodwill. The accompanying balance sheet at June 30, 1967 gives effect to this settlement."

In an attempt to create the impression in the mind of the jury that Marx & Co. has claims against William and Louis Fugazy, defendants have introduced the "Assignment" by Tower to Marx & Co. of any claims Tower had or might have had against William and Louis Fugazy.* Neither Marx & Co. nor Otto Marx has ever asserted claims against William and Louis Fugazy arising out of the Tower transactions. The assignment was simply a device to eliminate completely all obligations any of the parties to the Tower transactions had or might have had to Tower. The events which, together with the assignment, eliminated all potential claims of Tower against the other parties to the Tower transactions, are set forth below.

Fugazy Travel Bureau (Travelmarx) brought an action against Tower for misrepresentation and breach of

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* A copy of the Assignment, "Defendants' Exhibit K" for identification, is contained in the Exhibit Book.

warranty concerning the financial condition of the Fugazy Group as of September 30, 1962 and December 31, 1962. Tower counterclaimed against Fugazy Travel Bureau for breach of certain contractual provisions in the February 15, 1963 purchase agreement for the acquisition of the Fugazy Group by Travelmarx. Fugazy Travel Bureau and Tower were the sole parties to that lawsuit. Tower did not assert any claims against William and Louis Fugazy either as additional defendants on Tower's counterclaim or as third-party defendants. Moreover, Tower has never asserted any claims against William and Louis Fugazy in any other action or proceeding.

Fugazy Travel Bureau and Tower settled their claims against each other in June 1967. Tower released all claims it had or might have had against Fugazy Travel Bureau, Marx & Co. and Otto Marx arising out of the sale of the Fugazy Group to Travelmarx. In consideration for this release, Fugazy Travel Bureau, Marx & Co. and Otto Marx paid $265,000 in cash to Tower and assigned to Tower the first $35,000 of the proceeds of any judgment or settlement of the Ernst & Ernst lawsuit. (A copy of the general release by Tower of Otto Marx, Marx & Co. and Fugazy Travel Bureau is contained in the Exhibit Book Tab G). On or about September 12, 1967, Fugazy Travel

Bureau and Tower entered into a stipulation of discontinuance, discontinuing the Tower action. (A copy of the stipulation of discontinuance between Fugazy Travel Bureau and Tower is contained in the Exhibit Book Tab H).

Under the terms of the February 15, 1963 purchase agreement, Travelmarx and Otto Marx could not assert claims directly against William and Louis Fugazy. Any claims that Travelmarx and Marx sought to assert with respect to their purchase of the Fugazy Group had to be asserted against Tower. Tower in turn could then assert claims against William and Louis Fugazy for misrepresentations made by Tower to Travelmarx with respect to the Fugazy Group. Tower never asserted any such claims.

Thus, Tower's only possible remaining claims were the claims that it may have had against William and Louis Fugazy, arising out of the agreement by which William and Louis Fugazy represented and warranted to the truthfulness and accuracy of the representations and warranties given by Tower to Travelmarx concerning the Fugazy Group. As part of the settlement with Tower, Tower assigned the claims it had or may have had against William and Louis Fugazy to Marx & Co. It must be remembered that Tower was in reorganization and that Tower's trustee was seeking to clean up all of Tower's potential claims and liabilities.

The trustee in reorganization was well aware that throughout the duration of the Tower lawsuit, Tower never asserted any claims against William or Louis Fugazy.

Defendants also have sought to introduce during this trial the deposition of William Fugazy, taken almost twelve years ago, in an action entitled William D. Fugazy v. Time, Inc. and Robert H. Boyle, brought in the Supreme Court of the State of New York, County of New York.* This was a libel action commenced by William Fugazy arising out of an article published in the February 20, 1961 issue of Sports Illustrated. Plaintiffs cannot fathom what this has to do with the present lawsuit.

Conclusion

Defendants have sought to introduce the Tower transactions, the Tower and Ernst & Ernst lawsuits, the settlement of the Tower claims and the Time deposition of William Fugazy for the purpose of distracting the jury, prejudicing plaintiffs' case and dragging out this trial. As has been shown, these matters are irrelevant to the

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* The transcript of this deposition was marked at trial as "Defendants' Exhibit I" for identification.

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Ex. book

EXHIBITS TO PLAINTIFFS' MEMORANDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

MARX & CO., INC., et al., :

Plaintiffs, :

-against- :

THE DINERS' CLUB, INC., et al., :

Defendants, :

-against- : Consolidated Case 72 Civ. 4324

WILLIAM D. FUGAZY, et ano., :

Third-Party Defendants. : 70 Civ. 3064

- -x

WILLIAM D. FUGAZY, et ano., :

Plaintiffs, :

-against- :

THE DINERS' CLUB, INC., et al., :

Defendants, :

-against- :

MARX & CO., INC., et al., :

Additional Defendants on the Counterclaims. :

- -x

EXHIBIT BOOK

TABLE OF CONTENTS

A. Purchase Agreement for the Sale of the Fugazy Group by Tower to Travelmarx

B. Complaint in the Tower Action, Defendants' Exhibit L for Identification

C. Answer in the Tower Action

D. Amended Complaint in the Ernst & Ernst Action

E. Answer in the Ernst & Ernst Action

F. Order Dated July 7, 1967 of the United States District Court for the Middle District of Florida

G. General Release by Tower of Otto Marx, Jr., Marx & Co. and Fugazy Travel Bureau

H. Stipulation of Discontinuance of the Tower Action

I. Transcript of the Deposition of William D. Fugazy in William D. Fugazy v. Time, Inc. and Robert H. Boyle, Defendants' Exhibit I for Identification

J. Agreement Dated February 15, 1963 Between Fugazy Travel Bureau, William Fugazy, Louis Fugazy and Tower, Defendants' Exhibit J for Identification

K. Assignment Dated August 22, 1967 by Tower to Marx & Co., Defendants' Exhibit K for Identification

PURCHASE AGREEMENT

This AGREEMENT, dated the 15th day of February, 1963 by and among Tower Universal Corporation, a Delaware corporation (hereinafter called "Tower"), Travelmarx, Inc., a New York corporation (hereinafter called "the Purchaser") Fugazy Travel Bureau, Inc., a New York corporation, (hereinafter called "Fugazy Inc.") and Otto Marx, Jr. (hereinafter called "Marx").

W I T N E S S E T H :

WHEREAS, Tower owns all of the issued and outstanding stock of Fugazy Inc. and the shares of stock of certain other corporations engaged in the travel agency business, as set forth below:

Name of Corporation	Total No. of Issued and Outstanding Shares	Shares held by Tower
Fugazy Travel Bureau Inc. of California	87 1/2	37 1/2
Fugazy Travel Bureau Inc. of San Francisco	100	50
Fugazy Travel Bureau of Illinois Inc.	10	5
Fugazy Travel Bureau Inc. of Dallas, Texas	100	50
Fugazy Travel Bureau Inc. of Washington,D.C.	100	62 1/2
Fugazy Travel of Orange-Rockland, Inc.	99	66
Westheim Travel Service Inc.	14	14
Westheim Travel Service Inc. of Stamford	1000	1000
Travel, Inc.	100	100
Percival Tours, Inc.	20	20
Tom Duffy Travel Service,Inc.	100	100

AND WHEREAS, Fugazy Inc. owns all of the issued and outstanding shares of the corporations set forth in the above tabulation other than the shares owned by Tower; and

WHEREAS, Tower wishes to sell all of its interest in Fugazy Inc. and the other above mentioned corporations (hereinafter together referred to as "The Fugazy Group Corporations") to the Purchaser and the Purchaser wishes to acquire such property on the terms and conditions set forth herein.

NOW,THEREFORE, in consideration of the premises and the mutual covenants and conditions herein contained, it is hereby agreed as follows:

1. Representations and Warranties of Tower

Tower represents and warrants to the Purchaser and to Marx as follows:

(a) Tower is a corporation duly organized and validly existing under the laws of the State of Delaware. It has the corporate power and authority to carry on its business as now being conducted, to become a party to this Agreement and to carry out all provisions hereof. All necessary corporate proceedings have been duly taken to authorize it to enter into this agreement and consummate all transactions contemplated hereby.

(b) Fugazy Inc. is a corporation duly organized and validly existing under the laws of the State of New York. It is duly qualified to do business in the states of New Jersey, Pennsylvania, Ohio, Texas and Minnesota, which are the only other states in which it owns or occupies property or conducts operations.

(c) The corporations listed in the following tabulation are duly organized and validly existing under the laws of the States of Incorporation indicated in such tabulation and have the corporate power and authority to carry out their business as now being conducted. Except as indicated, none of such corporations is or is required to be licensed or authorized to do business in any jurisdiction other than its state of incorporation.

NAME	STATE OF INCORPORATION
Fugazy Travel Bureau Inc. of California	California
Fugazy Travel Bureau Inc. of San Francisco	California
Fugazy Travel Bureau of Illinois Inc.	Illinois
Fugazy Travel Bureau Inc. of Dallas, Texas	Texas
Fugazy Travel Bureau Inc. of Washington	District of Columbia
Fugazy Travel of Orange-Rockland, Inc.	New York
Westheim Travel Service, Inc.	New York
Westheim Travel Service, Inc.of Stamford	Connecticut
Travel, Inc.	District of Columbia
Percival Tours, Inc.	New York
Tom Duffy Travel Service, Inc.	New York

*(Percival Tours, Inc. is qualified to do business in Illinois and California.)

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(d) Tower is the owner of all of the outstanding shares of stock of Fugazy Inc. free and clear of all encumbrances, equities and liabilities of every nature. Except with respect to the shares of Travel, Inc., Tower or Fugazy Inc. are the owners of all of the shares of capital stock of each of the other Fugazy Group Corporations, free and clear of all encumbrances, equities and liabilities of every nature.

(e) Tower is the beneficial owner of all of the issued and outstanding shares of Travel, Inc., free and clear of all encumbrances, equities and liabilities of every nature, except that Certificates for the shares of Travel, Inc. which Tower agreed to acquire pursuant to an agreement dated November 24, 1961 with Claire Craig Oglesby have not been delivered by Mrs. Oglesby pending registration under the Securities Act of 1933 of the Tower shares issued to her under said agreement.

(f) There is no indebtedness from Fugazy Inc. to Tower, except in the net amount of $490,490.55 (representing a demand note dated December 5, 1961 payable to Tower, in the amount of $500,000 with interest, plus accrued interest on such note in the amount of $47,541.70 to February 22, 1963, less sundry inter-company accounts with a net balance in favor of Fugazy Inc. as of February 15, 1963 in the amount of $57,051.15).

(g) (A) The combined balance sheet of the Fugazy Group Corporations as of September 30, 1962 and the combined statement of income and expense and retained-earnings deficit for the year ended September 30, 1962, copies of which have been furnished to the Purchaser and to Marx, have been examined by Ernst & Ernst as set forth in its opinion dated December 21, 1962. Subject to the exceptions set forth in the aforesaid opinion and to those set forth below, such financial statements, together with the unaudited combined balance sheet of the Fugazy Group Corporations as of December 31, 1962 and the combined statement of income and expense and retained-earnings deficit for the three months ended on that date, copies of which have also been furnished to the Purchaser and to Marx, were prepared in accordance with generally accepted accounting principles applied on a consistent basis and present fairly on a combined basis the financial position of such corporations at the dates of such balance sheets and the results of their operations for the periods covered by such statements of income and expense and retained-earnings deficit. Except to the extent of the first $75,000 of liabilities which are asserted as defenses, set-offs or counterclaims to Accounts Receivable and arise out of the same transactions giving rise to such Accounts Receivable (or as to which such Accounts Receivable are asserted as defenses, set-offs or counterclaims) none of the Fugazy Group Corporations had any liabilities on December 31, 1962 of any kind or nature (whether absolute, accrued, contingent or otherwise and whether due or to become due) arising out of any transaction of the Fugazy Group Corporations or any one of them entered into between October 1, 1961 and December 31, 1962, or arising out of any state of facts existing between those dates, nor, to Tower's knowledge, had on such date any such liability arising out of any transaction entered into or state of facts existing prior to October 1, 1961, other than those (i) arising out of contracts included among the exceptions set forth in Section 1 (m) hereof under which none of the Fugazy Group Corporations were in default on the date of this Agreement; (ii) asserted in the litigation described in Exhibit A hereto; or (iii) reflected, referred to or reserved against on such combined balance sheets as of September 30 and December 31, 1962 or in the notes thereto; and the amounts of such liabilities shown on such combined balance sheet are correct.

(B) The Accounts Receivable reflected in the aforesaid combined balance sheets were genuine, valid and subsisting obligations of the obligors and there will not be asserted in respect of such Accounts Receivable any defenses, set-offs or counterclaims in excess of an aggregate of $75,000. (Except as aforesaid, no representation or warranty is made as to the collectibility of such Accounts Receivable or as to the sufficiency of the Provision for Doubtful Accounts in the aforesaid combined balance sheets.)

(h) The Fugazy Group Corporations have good and marketable title to all of the properties and assets reflected on the combined balance sheet as of December 31, 1962 and hold such properties and assets free and clear of all liens, encumbrances, restrictions and adverse claims, except as indicated in such balance sheet and the notes thereto and except that title to the premises at 351 Sixth Avenue is held by Tower as nominee and agent for Fugazy Inc.

(i) None of the Fugazy Group Corporations are a party to any actions, suits or proceedings except as set forth in Exhibit A hereto, as a defendant or a party against whom a counterclaim has been pleaded.

(j) The provisions for taxes on the combined balance sheets as of September 30,1962 and December 31, 1962 are sufficient for all accrued and unpaid Federal and any other taxes with respect to the year ended September 30,1962 and the three months ended December 31,1962, whether or not disputed. Income tax returns for the respective corporations have been audited through the fiscal years as set forth below.

AME OF CORPORATION	FISCAL YEAR ENDED
Fugazy Inc.	April 30,1959
Fugazy Travel Bureau Inc. of California	July 31,1959
Fugazy Travel Bureau Inc. of San Francisco	None
Fugazy Travel Bureau Inc. of Illinois Inc.	"
Fugazy Travel Bureau of Dallas, Texas	"
Fugazy Travel Bureau of Washington	"
Fugazy Travel Of Orange-Rockland, Inc.	"
Westheim Travel Service, Inc.	Dec. 31,1958
Westheim Travel Service, Inc. of Stamford	Dec. 31,1958
Travel, Inc.	None
Percival Tours, Inc.	August 31,1960
Tom Duffy Travel Service, Inc.	Dec. 31,1956

(k) Since December 31,1962 there has been no change in the properties or financial condition of any of the Fugazy Group Corporations, and no change in their assets or liabilities, other than changes occurring in the ordinary course of business which have not on balance been

materially adverse, or other than as indicated in this Agreement. For the purposes of this Subsection, a change in the business of any of the corporations shall not be deemed materially adverse if it is consistent with the normal seasonal character of the business of such corporation.

(l) Since December 31,1962 none of the Fugazy Group Corporations has

(i) issued, purchased or redeemed any shares of its capital stock or paid or declared any dividend;

(ii) without the consent of the Purchaser (A) incurred or agreed to incur any indebtedness except in the ordinary course of business; or (B) borrowed any money, except borrowings in the ordinary course of business and which did not involve a net increase in borrowings in excess of $600,000 in the aggregate;

(iii) sold, mortgaged, pledged or otherwise disposed of any of its assets or properties or contracted to do so, except pursuant to accounts receivable financing arrangements with G.A.C. Commercial Corporation or except as indicated in this Agreement;

(iv) granted any general wage increase or entered into any employment contracts, except oral agreements terminable at will by the employer.

(v) made any payments or incurred any obligations to officers in excess of amounts regularly payable;

(vi) incurred any liabilities or commitments or entered into transactions not in the ordinary course of business, except as indicated in this Agreement.

(vii) made any substantial change in the manner of conducting its business, except as disclosed in the combined balance sheet as of December 31,1962 and the notes thereto.

For all purposes of this Agreement, borrowings pursuant to existing accounts receivable financing arrangements with G.A.C. Commercial Corporation shall be deemed to be in the ordinary course of business.

(m) The Fugazy Group Corporations have no material continuing or executory contractual commitments, including, without limitation, leases, employment, labor, pension, bonus or retirement contracts or plans, except the informal arrangements with Stardust Tours or as disclosed herein, or in the combined balance sheets as of September 30, 1962 and December 31, 1962 and the notes thereto, or as set forth in Exhibit B hereto, except in connection with the sale of travel and tours in the ordinary course of business.

(n) None of the Fugazy Group Corporations is in default in any material respect under any contract by which it is bound.

(o) The Fugazy Group Corporations have in full force and effect, with all premiums due thereon paid, the policies of insurance set forth in Exhibit C hereto, or renewals thereof.

(p) The Fugazy Group Corporations are the holders of appointments in the conferences set forth in detail in Exhibit D hereto.

(q) There is no outstanding claim for services, either in the nature of a finder's or origination fee or otherwise, with respect to this Agreement resultingfrom any act of Tower for which the Purchaser or Marx may be responsible; nor is there to Tower's knowledge any outstanding claim for such services with respect to this Agreement whatsoever, other than a claim of Hurd & Co., and/or Charles Beigel. Tower will be responsible for any such claim of Hurd & Co., and/or Charles Beigel as a finder or broker in connection with the transactions contemplated hereby and is executing an agreement with Hurd concurrently herewith with respect to such claims.

(r) The directors of the Fugazy Group Corporations are as follows:

NAME OF CORPORATION	NAMES OF DIRECTORS
Percival Tours, Inc.	Harold E. M. Percival Mary McR. Percival
Tom Duffy Travel Service, Inc.	Thomas S. Duffy Martha E. Duffy Robert Gilford
Travel, Inc.	Claire Craig Oglesby E. G. Delgado John M. Izik, Jr.
Westheim Travel Service, Inc.	Robert Lewis Mary Alice Lewis Marie Lewis
Westheim Travel Service Inc. of Stamford	Robert Lewis Mary Alice Lewis Marie Lewis Edward P. Wagner
Fugazy Inc.	David B. Chase I. Jerome Riker Donald J. Singer Louis Fugazy William D. Fugazy Irene Fugazy
All Other Fugazy Group Corporations	Louis Fugazy William D. Fugazy Irene Fugazy

2. Representations and Warranties of the Purchaser and of Marx

The Purchaser and Marx represent and warrant as follows:

(a) The Purchaser is a corporation duly organized and validly existing under the laws of the State of New York. It has the corporate power and authority to carry on its business as contemplated by this Agreement, to become a party to this Agreement and to carry out all provisions hereof. All necessary corporate proceedings have been duly taken to authorize it to execute this Agreement and to consummate all transactions contemplated hereby. It is not required to be licensed or authorized to do business in any jurisdiction other than the State of New York.

(b) All of the outstanding shares of the Purchaser are duly and validly authorized and issued, fully paid and non-assessable with no personal liability attaching to the ownership thereof, except under Section 71 of the New York Stock Corporation Law. Since its organization, the Purchaser has engaged and up to the time of Closing will engage in no transactions of any character and has incurred and will incur no obligations or liabilities of any character, absolute or contingent, except for (i) ordinary corporate organization expenses; (ii) the issuance of shares of common stock or preferred stock to the persons described in Section 2(c) for net proceeds to the Purchaser of a minimum of $250,000; and (iii) obligations and commitments pursuant to this Agreement.

(c) At the Closing, all of the outstanding shares of the Purchaser will be owned by Marx & Co.,Inc. or by no more than five other persons closely associated with Marx & Co.,Inc. or Fugazy Inc. and no other persons will have any beneficial interest, direct or indirect, in such shares, except as shareholders of Marx & Co.,Inc.

(d) The Purchaser is acquiring the shares of the Fugazy Group Corporations to which this Agreement relates for indefinite investment and not with a view to distribution; and the Purchaser has no present intention of making a public offering of any of its securities.

(e) There is no outstanding claim for services, either in the nature of a finder's or origination fee or otherwise, with respect to this Agreement, resulting from any act of the Purchaser or of Marx for which Tower may be responsible; nor is there to Purchaser's or Marx's knowledge any outstanding claim for such services with respect to this Agreement whatsoever, other than a claim of Hurd & Co. and/or Charles Beigel.

3. Purchase and Sale

(a) Subject to the terms and conditions set forth below, Tower agrees to sell to the Purchaser and the Purchaser agrees to purchase all of the issued and outstanding stock of Fugazy Inc. for a purchase price of $1,400,000, payable as provided in Section 4 hereof.

(b) At or prior to the Closing, Tower will enter into an agreement with Fugazy Inc. under which (i) Fugazy Inc. will transfer to Tower the beneficial ownership of, and all of its right, title and interest in and to, the premises at 351 Sixth Avenue, New York City, free and clear of a mortgage with a balance of principal of approximately $6,125, and with the usual adjustments for taxes, assessments and insurance, in satisfaction of $91,253 of the indebtedness owed by Fugazy Inc. to Tower referred to in Section 1(f) hereof; (ii) Tower will transfer to Fugazy Inc. as a contribution to surplus the balance of the indebtedness of Fugazy Inc. to Tower, in the amount of $399,237.55 plus accrued interest at 7% per annum on the $500,000 note referred to in Section 1(f) hereof from February 22, 1963 to the Closing and (iii) Tower will transfer to Fugazy Inc. as a contribution to surplus all of the shares of stock of the Fugazy Group Corporations listed in the first recital to this Agreement. Except with respect to certificates for stock of Travel, Inc., certificates for such stock shall be delivered endorsed in blank or accompanied by separate assignments duly executed in blank. With respect to Travel, Inc., Tower shall deliver an assignment of all of its right, title and interest in such stock. Such certificates or assignments shall have attached all necessary Federal and State Stock Transfer Stamps.

(c) At or prior to the Closing Tower will cause Percival Tours, Inc. to accept, in satisfaction of the net indebtedness of Tower to Percival Tours, Inc. on notes or on open account in the total amount of approximately $65,500 [to be finally determined by adding, to a note balance of $60,000, accrued interest at 7% per annum to the date of Closing (such accured interest being $5,368.88 as of February 15, 1963)], an unsecured note of Tower in that amount bearing interest at 5% per annum payable annually and dated the date of Closing, one-half of the principal of which will be payable on the first anniversary of the Closing and the balance on the second anniversary of the Closing.

4. The Closing

The Closing shall take place on February 28, 1963, as of the close of business, at the offices of Tower or at such earlier or later date as Tower and the Purchaser may agree to. At the Closing

(a) Tower shall sell and deliver to the Purchaser certificates for all of the outstanding shares of stock of Fugazy Inc. Such certificates shall be endorsed in blank or shall be accompanied by separate assignments duly executed in blank and shall have attached all necessary Federal and State Stock Transfer Stamps.

(b) The Purchaser shall deliver to Tower

(i) a certified or cashier's check for $250,000 payable in New York Clearing House funds.

(ii) Two promissory notes of the Purchaser, each dated the date of the Closing and in the principal amount of $125,000, and due 12 months and 24 months after the Closing respectively, with interest on unpaid principal at 5% per annum payable annually. Such notes shall be in the form of Exhibit E hereto, and as provided in Section 10(a) hereof shall be personally guaranteed by Marx. (Such notes are hereinafter referred to as the "Guaranteed Notes").

(iii) A promissory note of the Purchaser in the face amount of $900,0[illegible] in the form of Exhibit F hereto, and secured by a pledge of all of the issued and outstanding shares of Fugazy Inc. pursuant to a pledge agreement in the form of Exhibit G hereto. (Such note is hereinafter referred to as the "Secured Note" and the pledge agreement as the "Pledge Agreement". The Guaranteed Notes and the Secured Note are together hereinafter referred to as "the Notes".)

(c) The Purchaser as tenant and Tower as landlord shall enter into a lease in standard form, providing for the letting to the tenant of the ground floor and basement of the premises at 351 6th Avenue, New York City for a term expiring on January 31,1968, with a rental at the rate of $7,000 a year, with the option to the tenant to renew such lease for an additional five year term at $7,500 a year. Such lease shall be subject to cancellation as at the end of any calendar month by the tenant on 30 days prior written notice to the landlord at any time within six months after the Closing, or by the landlord on 180 days prior written notice given to the tenant at any time, except that if such notice of cancellation is given by the landlord, the landlord shall be obligated to pay to the tenant the sum of $5,000 in cash on the effective date of cancellation of the lease. Such lease shall also provide that the landlord shall be required to render no services in connection with the premises, except the provision of heat, maintenance and repairs.

5. Merger of Fugazy Inc. and the Purchaser

As soon as possible after the Closing and within not more than thirty days thereafter, the Purchaser and Fugazy Inc. will merge with Fugazy Inc. as the surviving Corporation, which shall expressly assume all obligations of the Purchaser

under the Notes, this Agreement and the Pledge Agreement. The Purchaser, Fugazy Inc. and Marx agree that immediately after the consummation of the merger, all of the outstanding voting securities of the surviving corporation shall be effectively pledged under the Pledge Agreement.

6. Option of Purchaser

The Purchaser shall have the option to discharge the principal of the Secured Note by the payment of $300,000 less than the unpaid balance of the face amount thereof, if such amount is paid within thirty six months of the Closing; or by payment of $150,000 less than the unpaid balance of the face amount thereof, if paid within forty-eight months from the date of Closing, plus in the latter case interest to the extent provided in the Secured Note on the unpaid portion of the original face amount of such Note. Any such payment of less than the unpaid balance of the face amount of the Secured Note shall be deemed to reduce the aggregate purchase price hereunder by an amount equal to the difference between the face amount of the Secured Note and the aggregate of all amounts actually paid thereon.

7. Conditions of Closing

(a) The obligation of Tower to deliver the common stock of Fugazy Inc. is subject to the fulfillment, to the reasonable satisfaction of Tower and of its counsel at the Closing, of the following conditions.

(i) The representations and warranties of the Purchaser and of Marx contained in Section 2 hereof and made in any certificate furnished by or on behalf of the Purchaser or Marx in connection with the transactions contemplated hereby shall be correct when made and at and as of the time of Closing.

(ii) The Purchaser and Marx shall not have defaulted in any obligation under this Agreement required to be performed by them prior to Closing.

(iii) Tower shall have received a certificate executed by the President and Secretary of the Purchaser and by Marx, dated the date of the Closing, certifying that the conditions set forth in Paragraphs (i) and (ii) of this Subsection are satisfied.

(iv) Tower shall have received an opinion from Kramer, Marx, Greenlee & Backus, counsel for the Purchaser and for Marx, dated as of the date of Closing, to the effect that the representations and warranties in Subsections (a) and (b) of Section 2 hereof are true and correct as of the date of Closing, that this agreement has been duly executed and delivered by the Purchaser,

Fugazy Inc. and Marx and is binding upon them in accordance with its terms; and that the offer, sale and delivery of the Fugazy Inc. common stock by Tower will constitute exempt transactions under the Securities Act of 1933 insofar as the status of the Purchaser as an "underwriter" under such Act is concerned.

(v) Tower and the Associations, Conferences and Surety Companies listed in Exhibit D hereto shall have entered into agreements, the effectiveness of which shall be conditioned upon the consummation of the Closing of this Agreement, terminating the guarantee by Tower of the obligations of Fugazy Inc. and/or any of the other Fugazy Group Corporations.

(vi) At the Closing there shall be no litigation pending in which an injunction is or may be sought against the transactions contemplated hereby or in which any relief whatsoever is or may be sought against Tower as a result of this Agreement or the transactions contemplated hereby, including any claim for finder's or broker's fees, other than as set forth in Section 1(q) hereof.

Any of the foregoing conditions may be waived by Tower.

(b) The obligations of the Purchaser at the Closing shall be subject to the fulfillment, to the reasonable satisfaction of the Purchaser and of its counsel at the Closing, of the following conditions:

(i) The representations and warranties of Tower contained in Section 1 hereof and made in any certificate furnished by or on behalf of Tower in connection with the transactions contemplated hereby shall be correct when made and as at the time of Closing, except as provided in Section 3(b) hereof.

(ii) From the date hereof to the Closing there shall not have been any change of the character referred to in Section 1(k) hereof and none of the Fugazy Group Corporations shall have done any of the acts or entered into any of the transactions referred to in Section 1(l) hereof without the consent of the Purchaser; and no indebtedness of Fugazy Inc. to Tower shall have been created in addition to that set forth in Section 1(f) hereof;

(iii) At the Closing, Fugazy Inc. shall be the owner of all of the shares of capital stock of each of the other Fugazy Group Corporations, free and clear of all encumbrances, equities and liabilities of every nature (except with respect to the shares of Travel, Inc.); Fugazy Inc. shall be the

beneficial owner of all the issued and outstanding shares of Travel, Inc., free and clear of all encumbrances, equities and liabilities of every nature except as stated in Section 1(e) hereof; and Tower will convey to the Purchaser title to all of the outstanding shares of Fugazy, Inc., free and clear of all encumbrances, equities and liabilities of every nature.

(iv) Tower shall not have defaulted in any obligation under this Agreement required to be performed by it prior to Closing.

(v) The Purchaser shall have received a certificate executed by the President or a Vice President and a Secretary or an Assistant Secretary of Tower, dated the date of the Closing, certifying that the conditions set forth in Paragraph (i), (ii), (iii) and iv) of this Subsection are satisfied.

(vi) The Purchaser shall have received an opinion of Saxe, Bacon & O'Shea, Joseph F. Romano or Strasser, Spiegelberg, Fried & Frank, counsel for Tower, dated the date of Closing, to the effect that the representations and warranties in Subsections (a), (b) and (c) of Section 1 hereof are true and correct as of the date of Closing; that the conditions of Paragraph (iii) of this Subsection are satisfied; and that this Agreement has been duly executed and delivered by Tower and Fugazy Inc. and is binding upon them in accordance with its terms. (In rendering said opinion such counsel may rely as to matters of the law of jurisdictions other than the State of New York upon opinions rendered by attorneys duly licensed to practice in each of said jurisdictions.)

(vii) The Agreement referred to in Section 3(b) shall have been entered into, and the transfers contemplated thereby shall have been consummated, subject to the consummation of the Closing.

(vi) Tower shall have delivered to the Purchaser resignations, effective as at the date of Closing, of all directors and officers of the Fugazy Group Corporations.

(vii) The Purchaser shall be satisfied, on the basis of information and advice from Arthur Andersen & Co., as to the validity and collectibility of the Accounts Receivable as set out in the combined balance sheet of the Fugazy Group Corporations as of December 31, 1962.

(viii) Temporary or final approval of the conferences and associations set forth is Exhibit D of the transactions contemplated hereby shall have been procured.

(ix) At the Closing there shall be no litigation pending in which an injunction is or may be sought against the transactions contemplated hereby or in which any relief whatsoever is or may be sought against Fugazy Inc., the Purchaser or Marx as a result of this Agreement or the transactions contemplated hereby, including any claim for inder's or broker's fees.

Any of the foregoing conditions may be waived by the Purchaser.

(c) The obligations of Tower and of the Purchaser at the Closing shall be subject to the condition, which they may jointly waive, that consent shall have been obtained from G.A.C. Commercial Corporation, pursuant to Paragraph 16 of the Accounts Receivable Loan Agreement dated November 12, 1962 between Fugazy Inc. and G.A.C. Commercial Corporation, to the material change in the management of Fugazy Inc. which will result from the Closing of this Agreement.

8. Covenants of Fugazy Inc. after the Merger

Fugazy Inc. and the Purchaser agree that, after the merger referred to in Section 5 hereof, Fugazy Inc., as the surviving corporation of the merger, will, until all principal, interest and other claims on the Notes have been paid in full, but except in so far as Tower may give its written consent to the contrary, duly and faithfully perform and comply with the following covenants:

(a) Fugazy Inc. will use its best efforts to cause to be elected as a director of Fugazy Inc. a person designated by Tower, subject to the reasonable approval of the Purchaser or Fugazy Inc. At any time when a person designated by Tower is not serving as a director of Fugazy Inc., Fugazy will allow any authorized representative of Tower to visit and inspect any of the properties or operations of Fugazy Inc. or any subsidiary, to examine any and all books and records of Fugazy Inc. and any subsidiary (including, without limitation, minutes of all meetings of the Board of Directors or any committee thereof, all correspondence and contract files and all accounting records), to make copies of any thereof, and to discuss the affairs of Fugazy Inc. and its subsidiaries with its officers, employees and accountants, all at such reasonable times and as often as Tower may request, but subject to the reasonable business convenience of Fugazy Inc.; and Fugazy Inc. will give to Tower due notice of all directors and shareholders meetings and will allow a representative of Tower to be present at all such meetings.

(b) Fugazy Inc. will not merge or consolidate, or sell, mortgage, pledge, lease or otherwise dispose of all or substantially all of its assets; or purchase, lease or otherwise acquire any assets, tangible or intangible, which represent or constitute part or all of a going business other than a business incidental to the wholesale or retail travel agency and tour business. Fugazy Inc. will not permit any subsidiary to engage in any act or transaction prohibited to Fugazy Inc. itself under the previous sentence.

(c) Fugazy Inc. and its subsidiaries will not engage in any business or activities other than a business which is incidental to the wholesale or retail travel agency and tour business. It is expressly understood and agreed that among the types of activity in which Fugazy Inc. and its subsidiaries may engage is the issuance of its own line of travelers checks. Notwithstanding the foregoing provisions of this Section, Fugazy Inc. and its subsidiaries may engage in activities which are unrelated to the travel agency and tour business if all such activities do not involve capital outlays or contractual commitments in excess of an aggregate of $150,000.

(d) In the event that Fugazy Inc. or any subsidiary realizes any funds from the sale of any assets (including any of its own securities or securities of a subsidiary) otherwise than in the ordinary course of business, Fugazy Inc. or such subsidiary will not employ such funds otherwise than for operating requirements or for paying principal, interest or other claims on the Notes. Without limiting the generality of the foregoing, Fugazy Inc. will not use such funds directly or indirectly to pay for any assets, tangible or intangible, which represent or constitute part or all of a going business,

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whether or not such going business is incidental to the wholesale or retail travel agency and tour business; or to repay loans or advances obtained for the purpose of paying for such assets; or to replenish funds of Fugazy Inc. used to make such payments.

(e) (A) Fugazy Inc. will not issue (whether for services, cash or other property, as a stock dividend, upon conversion or exchange of preferred stock, or otherwise) any stock carrying the power to vote for directors under any circumstances or amend its charter to alter the voting rights of its securities, if the effect of such issuance or amendment would be to dilute, directly or indirectly, the voting power with respect to the election of directors of the shares of common stock of Fugazy Inc. held by the Pledgee pursuant to the Pledge Agreement, except as may be specifically permitted by such Pledge Agreement.

(B) Fugazy Inc. will not purchase or redeem any of its shares, except that it may purchase or redeem shares of its preferred stock which have been issued (otherwise than pursuant to the merger with the Purchaser) after the Closing, provided that the consideration paid by Fugazy Inc. upon the purchase or redemption of any such shares does not exceed the amount received by Fugazy Inc. upon the issuance of such shares; and provided that the consideration paid by Fugazy Inc. upon the purchase or redemption of all of such shares does not exceed $50,000 in any period of 12 successive months, and does not exceed the amount by which (i) the total amount of cash received by the Purchaser (or Fugazy Inc. after the Closing) on the issuance of common or preferred shares exceeds (ii) $250,000.

(C) Except for annual dividends at the rate of 6% per annum on such shares of preferred stock as are sold after the Closing for a cash consideration to the issuer of no less than the par value thereof and on shares of preferred stock which are issued pursuant to the merger in exchange for preferred shares of the Purchaser with the same par value, provided that such preferred shares of the Purchaser have a maximum par value of $200,000 and were issued for a cash consideration to the Purchaser of no less than the par value thereof, Fugazy Inc. will not pay or make any dividend or distribution (except a stock dividend payable in common stock) with respect to any shares of stock.

(f) Fugazy Inc. will engage as independent auditors either Arthur Andersen & Co., Ernst & Ernst or J.K.Lasser & Co., or such other firm of certified public accountants as may be approved by Tower; such firm will be engaged to make a full audit at least once each fiscal year of the books and operations of Fugazy Inc. and its subsidiaries and to certify financial statements of Fugazy and its subsidiaries on a consolidated or combined basis; Tower and its representatives shall have access to all work papers of such accountants; and such accountants shall be instructed to furnish to Tower and its representatives all information in their possession regarding Fugazy Inc. and its subsidiaries and otherwise to discuss the affairs of Fugazy Inc. and its subsidiaries with the same freedom as if Tower were an officer or director of Fugazy Inc.

(g) As soon as practicable after the end of each fiscal year, Fugazy Inc. will furnish to Tower a balance sheet and statements of income and surplus of Fugazy Inc. and all subsidiaries as at the end of and for such year, on a consolidated or combined basis, all in reasonable detail, certified by the accountants referred to in Section 8(f); and as promptly as practicable after

the end of each of the first three quarters of each fiscal year, Fugazy Inc. will furnish to Tower corresponding financial statements, certified by the principal financial officer of Fugazy Inc., but which need not be audited, as of the end of and for each such quarter.

(h) Fugazy Inc. will make no additional loans or advances, whether of money or other property, to officers, directors, principal employees or shareholders (or to any person who stands in such relation to any of the foregoing that the definition of "dependent" or any of the rules of constructive ownership of property in the Internal Revenue Code as then amended, might be applicable); and will make no such loans to any other person otherwise than in the ordinary course of business.

(i) In the event that Fugazy Inc. incurs any indebtedness, whether or not evidenced by securities,

(i) as a result of loans or advances by Marx or any person who stands in such relation to him that the definition of "dependent" or any of the rules of constructive ownership in the Internal Revenue Code, as then amended, might be applicable; or

(ii) which is guaranteed by any person other than a subsidiary of Fugazy Inc.,

and (iii) such indebtedness is incurred prior to payment in full of principal, interest and all other claims on the Guaranteed Notes; or

(iv) the proceeds of such indebtedness are used directly or indirectly to make any payments on account of principal, interest or other claims on the Guaranteed Notes, or to repay loans or advances obtained for the purpose of making such payment, or to replenish funds of Fugazy Inc. used for such payment;

such indebtedness shall be expressly subordinated to all of the indebtedness and obligations of Fugazy Inc. and the Purchaser to Tower under this Agreement, the Notes and the Pledge Agreement referred to in Section 4 hereof, pursuant to a subordination agreement, in form reasonably satisfactory to Tower and its counsel, which provides, for the benefit of Tower, as follows:

(A) That, at a time when Fugazy Inc. is insolvent or unable to pay its debts as they mature, no payment of principal of such subordinated indebtedness or any portion thereof may be made by Fugazy Inc. or received by any holder thereof, and no redemption, retirement, purchase or other acquisition thereof shall be made by Fugazy Inc. unless and until all principal, interest and other claims on the Notes shall have been paid in full;

(B) that no payment of interest on any such subordinated indebtedness may be made by Fugazy Inc. or received by any holder thereof if at the time thereof or immediately after giving effect thereto there shall exist any default in the payment of principal or interest on any of the Notes or any event of default under the Secured Note;

(C) that in any liquidation of the assets of the debtor (pursuant to any assignment for the benefit of creditors, or any statutory, judicial or administrative insolvency proceeding or otherwise), all claims on the Notes shall have full priority over any claims of any character on or in connection with the subordinated indebtedness;

(D) that if the holder or holders of any such subordinated indebtedness shall receive any payment of principal, premium or interest, with respect thereto in violation of subparagraphs (A), (B) and (C) above, such holder or holders shall receive such payment in trust for, and shall immediately turn the same over to or for the benefit of, the holder or holders of the Notes.

(j) Fugazy Inc. will not make any payment with respect to subordinated indebtedness in contravention of a subordination agreement for the benefit of Tower.

(k) Fugazy Inc. will not permit any subsidiary to incur any indebtedness which would not be a current liability under generally accepted accounting principles except to Fugazy Inc. itself; and will not permit any subsidiary to issue any other notes or incur any other indebtedness except in the ordinary course of business.

(l) Fugazy Inc. and its subsidiaries will not enter into any employment agreements or pay or become liable for any salary or other remuneration (whether direct, indirect or deferred) to any person who is an officer, director, stockholder of Fugazy Inc. or employee receiving compensation of $14,000 or more a year (or who stands in such relation to any of the foregoing that the definition of "dependent" or any of the rules of constructive ownership of property in the Internal Revenue Code, as then amended, might be applicable), if such employment agreement or payment involves an increase in remuneration over that which the particular officer or employee is receiving at the date of this Agreement, or if such person was not an officer or employee of Fugazy Inc. or a subsidiary at the date of this Agreement. Notwithstanding the foregoing, Fugazy Inc. and its subsidiaries may increase by $50,000. the total remuneration, including expenses and allowances, paid or payable to all such persons in any fiscal year over the total remuneration, including expenses and allowances, paid or payable to all such persons during the prior fiscal year.

(m) Fugazy Inc. and its subsidiaries will not institute any pension, bonus, profit sharing or other plan or arrangements providing for contingent or deferred remuneration which will require application of more than 10% of the consolidated net profits before taxes of Fugazy Inc. and its subsidiaries, determined in accordance with generally accepted accounting principles. The limitations on remuneration set forth in subsection (l) of this Section 8 shall not apply to any such plan or arrangements.

(n) Fugazy Inc. and its subsidiaries will not assume or guarantee the liabilities or obligations of any other person except a subsidiary of Fugazy Inc. or Fugazy Inc.

(o) Fugazy Inc. and its subsidiaries will carry insurance with responsible insurance companies with coverages and in amounts reasonable and customary in the light of the business conducted by them.

(p) Fugazy Inc. and its subsidiaries will (i) consent to the filing of a consolidated tax return by Tower with respect to the taxable year ending September 30, 1962; (ii) execute any returns or other documents necessary or desirable in connection with the filing of such consolidated return; (iii) make available to Tower from time to time such information and such of its records as may be requested by Tower in connection with the preparation thereof or in connection with any audit made of any returns of Tower; (iv) fully cooperate with Tower in the filing of such consolidated return and in the event of such an audit; and (v) execute any waivers or other documents relative to such audit.

(q) Fugazy Inc. will not dissolve, liquidate or discontinue as a whole or substantially as a whole the business activities conducted by Fugazy Inc. and its subsidiaries.

(r) As promptly as practicable and in any event within sixty days after the Closing, Fugazy Inc. will either (i) cause G.A.C. Commercial Corporation to deliver to Tower a general release of all claims against Tower under the Continuing Guarantee, dated November 12, 1962, between Tower and G.A.C. Commercial Corporation; or (ii) liquidate all of its indebtedness to G.A.C. Commercial Corporation in respect of which Tower continues liable under such agreement of Continuing Guarantee.

(s) (A) With respect to the following employment agreements:

Employer	Employee	Date of Execution
Fugazy Inc.	Robert Lewis	10/27/61
Travel, Inc.	Claire Craig Oglesby	12/1/61
Percival Tours, Inc.	Harold E. M. Percival	12/18/61
Percival Tours, Inc.	Mary McR. Percival	12/18/61
Tom Duffy Travel Service, Inc.	Thomas S. Duffy	12/26/61

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Fugazy Inc. or the other employers pursuant to such agreements will not give notice to an employee who is a party to such an agreement that the employee has been discharged for cause unless (1) the employer has grounds for the giving of such notice which are not arbitrary and capricious; and (2) Tower has been consulted a reasonable time in advance of the giving of such notice and has been advised in detail of the grounds for the proposed discharge and of any defenses known to the employer which the employee might assert to a claim that the employee is dischargeable for cause. The provisions of this paragraph and paragraph (B) of this subsection shall not be deemed in derogation of any rights or remedies which Tower may have against such employers by reason of the fact that the employers are primarily liable under the employment agreements while Tower is only secondarily liable thereunder.

(B) Fugazy Inc. will indemnify Tower against any and all loss or damages, excluding attorney's fees and expenses, which Tower may suffer by reason of its guarantees under such employment agreements.

(C) Prior to the termination of any of the foregoing employment agreements to which Tom Duffy Travel Service, Inc., or Travel, Inc. is a party, and so long as Marx is a member of the controlling group of Fugazy Inc. or the Purchaser, Fugazy Inc. will not sell or dispose of securities representing control of either of such corporations or all or a substantial part of the assets of any of them, nor permit such corporations to issue additional securities the effect of which would be to divest Fugazy Inc. of control of either of such corporations, unless Fugazy delivers to Tower (i) releases executed by the respective employer and employee in which Tower is released from all claims or demands, present or future, which they may have against Tower in connection with the respective agreement; or (ii) an agreement by Marx in which he agrees to indemnify Tower as set forth in paragraph (B) of this subsection with respect to such employment agreement; and Fugazy Inc. will not take such action at any time Marx is not a member of the controlling group of Fugazy Inc. or the Purchaser, unless Fugazy Inc. delivers to Tower the releases hereinabove described or exacts from the prospective controlling interest a covenant in substantially the same form as the covenant in subsections (s) (A) and (C) of this Section 8 relating to any of the foregoing employment agreements to which Tom Duffy Travel Service, Inc. or Travel, Inc. is a party.

9. Covenants of the Purchaser

The Purchaser warrants and covenants that prior to the merger of the Purchaser with or into Fugazy Inc., the Purchaser will not engage in any business activities or transactions of any character, except insofar as necessitated by the holding of securities of Fugazy Inc.

10. Covenants of Marx

(a) Marx agrees that he will personally guarantee payment of the Guaranteed Notes and will evidence such guarantee by an endorsement on such Notes in the form included in Exhibit E hereof.

(b) Marx warrants and covenants that the Purchaser will duly and faithfully perform the covenant set forth in Section 9 hereof; and that Fugazy Inc. will duly and faithfully perform the covenant set forth in Section 8(r) hereof. Marx further warrants and covenants that, so long as he is a member of the controlling group of Fugazy Inc. or the Purchaser, Fugazy Inc. will duly and faithfully perform the covenants set forth in Paragraphs (A) and (C) of Section 8(s) hereof and that he will use his best efforts to assure that Fugazy Inc. will duly and faithfully perform the covenants set forth in the remaining Subsections of Section 8.

(c) Marx warrants and covenants that, until payment in full of principal, interest and all other claims on the Notes, neither he nor any person who stands in such relation to him that the definition of "dependent" or any of the rules of constructive ownership in the Internal Revenue Code, as then amended, might apply, will directly or indirectly engage in any business which is competitive with any of the activities which have been engaged in by Fugazy Inc. or any of its subsidiaries at any time between the execution of this Agreement and such full payment.

11. Indemnity

(a) Subject to consummation of the Closing, Tower hereby agrees to indemnify and hold harmless the Purchaser and Fugazy Inc. and their respective successors and assigns from any and all loss or damage, including attorney's fees and expenses, resulting from or arising out of any claims or liabilities (including, without limitation, claims or liabilities resulting from or arising out of taxes of any character) with respect to the operations of the Fugazy Group Corporations for the period between October 1, 1961 and December 31, 1962 or resulting from or arising out of any claims or liabilities actually known to Tower with respect to the operations of the Fugazy Group Corporations for the period prior to October 1, 1961, except (i) claims or liabilities arising out of contracts included among the exceptions set forth in Section 1 (m) hereof under which none of the Fugazy Group Corporations were in default on the date of this Agreement; (ii) claims or liabilities asserted in the litigation described in Exhibit A hereto; (iii) to the extent that such claims or liabilities are reflected, referred to or reserved against in the combined balance sheets of the Fugazy Group Corporations as of September 30, 1962 or December 31, 1962; and (iv) claims and liabilities in an aggregate of $75,000 which are asserted as defenses, set-offs or counterclaims against Accounts Receivable reflected in the aforesaid combined balance sheets and arise out of the same transactions as such Accounts Receivable or as to which such Accounts Receivable are asserted as defenses, set-offs or counterclaims. The Purchaser or Fugazy Inc. shall give Tower prompt notice of any levy, imposition, assessment, claim, liability, action or proceeding and shall offer Tower an opportunity to participate at its own expense and with counsel of its own choice in the defense thereof.

(b) Subject to consummation of the Closing, and in the event the Purchaser shall not receive as of such Closing the opinion of Ernst & Ernst or Arthur Andersen & Co. to the effect that there is allowable to Fugazy Inc. as a deduction for Federal Income Tax purposes net operating losses incurred in the ordinary course of business subsequent to April 30, 1961 of not less than $500,000, Tower will indemnify the Purchaser and Fugazy Inc. against any loss or damage resulting from the disallowance, for any reason whatsoever, as a deduction for Federal Income Tax purposes in the four taxable years of Fugazy Inc. commencing subsequent to September 30, 1962 of any portion of the aforesaid net operating losses, provided, however, that the liability of Tower hereunder shall be limited to the lower of the following:

(1) $150,000, less all amounts by which the Federal Income Tax liability of Fugazy Inc. in the taxable year in which the Closing occurs and in the three succeeding taxable years is reduced by virtue of operating losses incurred by Fugazy Inc. prior to September 30, 1962; or

(2) The amount of Federal Income Taxes ultimately paid by Fugazy Inc. which would not have been payable had such $500,000 net operating loss deduction been allowed.

The Purchaser or Fugazy Inc. shall give Tower prompt notice of any notification of disallowance of the deduction hereinabove referred to, and shall offer Tower an opportunity to participate at its own expense and with counsel of its own choice in any administrative or judicial proceedings in connection therewith.

12. Miscellaneous

(a) Between the date of this Agreement and the Closing, Tower will cause the Fugazy Group Corporations to continue their operations in the ordinary course of business and to refrain, without the prior consent of the Purchaser, from entering into any material contracts, commitments or operations not in the ordinary course of business, and from selling, leasing or otherwise disposing of or purchasing any material property or assets other than in the ordinary course of business.

(b) All of the parties hereto agree that a determination of Net Profits after Taxes concurred in by the accountants referred to in Subsection 8(f) hereof shall be binding on all parties.

(c) Before the Closing, representatives of the Purchaser and of Tower, including independent public accountants and attorneys, may examine all of the properties, assets, books and records of the Fugazy Group Corporations and of the Purchaser, respectively, with a view to determining the accuracy of the representations made herein; and Tower and the Purchaser will cause the officers, agents and employees of the Fugazy Group Corporations and the Purchaser to cooperate in such examination and to disclose all pertinent information. If, for any reason, closing of this Agreement is not consummated, all information obtained as a result of such examinations shall be retained in confidence.

(d) All rights and remedies of Tower hereunder, and under the provisions of the Guaranteed Notes, the Secured Note, the Pledge Agreement and any other document made pursuant or incidental to this Agreement, shall be cumulative and severable. The exercise by Tower of any one or more rights or remedies hereunder or thereunder shall not preclude Tower from exercising any other of such rights or remedies hereunder or thereunder at the same or any other time or times; nor shall the invalidity of any term or provision hereof or of any such document or instrument render invalid any other term or provision thereof or hereof.

(e) All notices, requests, consents and other communications hereunder shall be in writing and shall be delivered by hand or mailed by registered or certified mail, postage prepaid, addressed as follows:

If to Tower:

Tower Universal Corporation
331 Madison Avenue
New York, N.Y.

with a copy to:

Strasser, Spiegelberg, Fried & Frank
120 Broadway
New York 5, N.Y.

If to Fugazy:

President
Fugazy Travel Bureau, Inc.
351 6th Avenue
New York, N.Y.

with a copy to:

Kramer, Marx, Greenlee & Backus
29 Broadway
New York, N.Y.

If to the Purchaser:

Travelmarx, Inc., c/o Marx & Co., Inc.
40 Wall Street
New York 5, N.Y.

with a copy to:

Kramer, Marx, Greenlee & Backus
29 Broadway
New York, N.Y.

If to Marx:

Otto Marx, Jr.
40 Wall Street
New York 5, N.Y.

with a copy to:

Kramer, Marx, Greenlee & Backus
29 Broadway
New York, N.Y.

Any party shall have the right to specify in writing a changed address to which subsequent notices to such party shall be given.

(f) This Agreement supersedes all prior negotiations and contains the entire understanding between the parties. It may be modified only in writing signed by the party against whom the modification is asserted. The statements in the certificates referred to in Sections 7(a)(iii) and 7(b)(v) shall be regarded as representations and warranties of the Purchaser and Tower respectively, subject to the consummation of the closing. All such representations and warranties and all other representations and warranties contained in this Agreement shall survive the Closing, except insofar as such representations and warranties relate to the materiality of adverse changes in the business of the Fugazy Group Corporations between December 31, 1962 which were actually known to the Purchaser or its agents or representatives. Each of the parties agrees that such party has relied solely upon the representations and warranties expressly set forth herein and that none of the other parties hereto shall be responsible for any representations or warranties except as specifically set forth herein.

(g) Except with respect to claims under the warranty set forth in Section 1(g)(B) hereof and the indemnity agreement in Section 11 hereof, none of the parties hereto shall assert any claim hereunder based on misrepresentation or breach of warranty until the aggregate amount of its respective claims shall exceed $20,000, and any claims asserted thereafter shall be limited to such excess. Notwithstanding any other provision of this Agreement, any claims or demands against Tower under this Agreement or any letter or certificate delivered in connection herewith for breach of any representation or warranty or pursuant to the provisions of Section 11 hereof shall be enforceable or collectible against Tower only through the medium of a set-off against the Secured Note and only after such claim has been reduced to final judgment from which no appeal is pending or can be taken. Under no circumstances shall any such claim, demand, liability or obligation serve as the basis of personal liability on the part of Tower or be set-off against any other debts or obligations owed to Tower by Fugazy Inc. or the Purchaser. In the event that an obligation of Tower to the Purchaser or Fugazy Inc. is reduced to judgment as aforesaid, the amount of such obligation as so determined may, at the option of the Purchaser or Fugazy Inc., be set-off and applied, without any action by Tower, in reduction of the next payments of principal due on the Secured Note or as a prepayment on account of principal due on the Secured Note. In the event that any claim, demand, liability or obligation has been asserted in good faith against Tower which might be the basis of a set-off if reduced to final judgment as aforesaid, any payments of principal on the Secured Note prior to entry of final judgment as aforesaid shall be made to a firm of attorneys then acting as counsel for Tower, subject to the reasonable approval of the Purchaser, to be held in escrow until such final judgment as aforesaid is entered, and then paid as the interests of the parties may appear.

(h) This Agreement shall be interpreted in accordance with the laws of the State of New York. The headings of this Agreement are for purposes of reference only and shall not limit or otherwise affect any of the terms hereof. This Agreement may be executed in two or more counterparts, each of which is to be deemed an original, but all of which together shall constitute one and the same instrument.

(i) This Agreement shall be binding upon the heirs, successors and assigns of the respective parties hereto. Any party hereto may assign any of its rights under this Agreement, but no such assignment shall relieve the assigning party of any of its obligations hereunder without the consent of all parties to whom such obligation is owed.

(j) It is understood and agreed by and between the respective parties hereto that this contract and the duties and obligations of all parties hereto are subject to the approval of the Board of Directors of Tower and of Travelmarx, Inc. If such approval is not obtained by February 21, 1963, this Agreement shall be null and void unless the Purchaser and Tower consent in writing to a later date for such approval.

(k) All parties hereto agree to use their best efforts to cause the conditions to Closing set forth in Sections 7 and 12 hereof to be satisfied.

(l) No action, suit or proceeding shall be brought to enforce any right hereunder prior to four months after notice of the claim has been given to all other parties hereto. This provision shall not apply to a right based on an event of default under the Secured Note; or to a right arising out of the assertion of an event of default.

(m) Subject to the consummation of the Closing, Tower will assign to Fugazy Inc. all of its benefits and rights against William Denis Fugazy under the letter agreement of July 27, 1961 between Tower, William Denis Fugazy and Fugazy Inc., a copy of which is annexed hereto as Exhibit G.

(n) Tower agrees to indemnify the Purchaser, Fugazy Inc. and Marx against loss or expense, including consequential damages, by reason of non-delivery of certificates for shares of Travel, Inc. to Fugazy Inc. prior to the Closing.

(o) Any payments in escrow pursuant to Section 12(g) hereof, and offsets and reductions against installments of principal on the Secured Note as therein authorized shall constitute payments of principal on the Secured Note for all purposes under this Agreement, the Secured Note and the Pledge Agreement.

IN WITNESS WHEREOF the parties hereto have executed this instrument this 15th day of February, 1963

TOWER UNIVERSAL CORPORATION

ATTEST: _____

By _____

FUGAZY TRAVEL BUREAU, INC.

ATTEST: _____

By _____

TRAVELMARX, INC.

ATTEST: _____

By _____
President

OTTO MARX, JR.

_____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FUGAZY TRAVEL BUREAU, INC.,

Plaintiff,

-against-

TOWER CREDIT CORPORATION

Defendant.

COMPLAINT

Plaintiff, by its attorneys, Kramer, Marx, Greenlee & Backus, complaining of the defendant respectfully alleges as follows:

FIRST: Fugazy Travel Bureau, Inc., (hereinafter referred to as "Fugazy") is a corporation duly incorporated by and existing under the laws of the State of New York, with its principal place of business at 488 Madison Avenue, New York City, New York.

SECOND: Upon information and belief, defendant Tower Credit Corporation, formerly known as Tower Acceptance Corporation and as Tower Universal Corporation (hereinafter referred to as "Tower"), is a corporation duly incorporated by and existing under the laws of the State of Delaware, with its principal place of business in the State of Florida.

THIRD: The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

FOURTH: From September, 1961 until the month of February, 1963, Tower was the owner of all of the outstanding stock of Fugazy.

FIFTH: As of February 15, 1963, Tower entered into and became a party to a written agreement by and between Tower, Travelmarx, Inc.(hereinafter referred to as "Travelmarx"), a New York corporation with its principal office at 40 Wall Street, New York City, Fugazy and Mr. Otto Marx, Jr. (which agreement is hereinafter referred to as the "Purchase Agreement"), and which provided for the sale by Tower to Travelmarx of all of Tower's stock holdings in Fugazy, for a gross purchase price of $1,400,000.

SIXTH: Plaintiff is the surviving corporation of the consolidation of March 26 1963 between Fugazy and Travelmarx.

SEVENTH: On or about February 28, 1963 all of the parties to the Purchase Agreement did execute and enter into a first amendment to the Purchase Agreement.

EIGHTH: During the year 1962 and as of the date of the Purchase Agreement Fugazy owned all of the outstanding common stock of the following corporations engaged in the travel business, to wit., Fugazy Travel Bureau, Inc. of Illinois; Fugazy Travel Bureau, Inc. of California; Fugazy Travel Bureau, Inc. of Dallas; Fugazy Travel Bureau, Inc. of Washington; Fugazy Travel Bureau, Inc. of San Francisco; Fugazy Travel Bureau, Inc. of Orange-Rockland; Tom Duffy Travel Service, Inc.; Percival Tours, Inc.; Westheim Travel Service, Inc.; and Westheim Travel Service, Inc. of Stamford; (which corporations together with Fugazy are hereinafter referred to as the "Fugazy Group").

NINTH: There was annexed as an Exhibit to the Purchase Agreement, as amended, a copy of the consolidated balance sheet of the Fugazy Group as of September 30, 1962 and a consolidated statment of income and expense of the Fugazy Group for the year ended September 30, 1962, and a copy of the balance sheet of Fugazy as of December 31, 1962 and of the statement of income and expense of Fugazy for the three months then ended.

TENTH: In furtherance of the transaction provided for in the Purchase Agreement, and for the purpose of inducing Travelmarx to enter into and consummate such Purchase Agreement, Tower did represent and warrant to Travelmarx that such balance sheets and statements of income and expense were prepared in accordance with generally accepted accounting principles applied on a consistent basis and presented fairly the financial position of the Fugazy Group and Fugazy on the dates of such balance sheets and the results of their operations for the period covered by such statements of income and expense.

ELEVENTH: The subject matter of the said representation and warranty made by Tower was material to the transaction provided for in the Purchase Agreement.

TWELFTH: The aforesaid representation by Tower to Travelmarx was false and misleading when made and on February 28, 1963, the date on which the acquisition was consummated, and the aforesaid warranty by Tower to Travelmarx has been breached, in that such balance sheets overstated the net worth of the Fugazy Group as of September 30, 1962 by $167,205.71, and of Fugazy as of December 31, 1962 by $384,011.97, and in that such statments of

income and expense overstated the income of the Fugazy Group for the twelve months ended September 30, 1962 by $161.403.81, and overstated the income of Fugazy for the three months ended December 31, 1962 by $205.351.95.

THIRTEENTH: In reliance on Tower's representation and warranty as aforesaid, Travelmarx did execute and enter into the Purchase Agreement and did consummate the transaction provided for therein by acquiring Tower's stockholdings in Fugazy, on or about February 28, 1963, for a gross purchase price of $1,400.000.

FOURTEENTH: As a result of Tower's misrepresentation and breach of warranty as aforesaid, plaintiff has suffered damage in the aggregate amount of $395,313.76, no part of which has been paid although duly demanded.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of $395,313.76, with interest from February 28, 1963, together with the costs and disbursements of this action.

KRAMER, MARX, GREENLEE & BACKUS
Attorneys for Plaintiff

By _____
A Member of the Firm

Office and Post Office Address
29 Broadway
New York, New York 10006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FUGAZY TRAVEL BUREAU, INC., Plaintiff,	:	
-against-	:	ANSWER AND COUNTERCLAIM
TOWER CREDIT CORPORATION, Defendant.	:	65 Civ. 2152

The defendant Tower Credit Corporation, by its attorneys Strasser, Spiegelberg, Fried & Frank, answering the complaint of the plaintiff, alleges:

FIRST: Denies each and every allegation contained in paragraphs Eighth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth of the complaint.

SECOND: Denies each and every allegation contained in paragraph Fifth of the complaint, except admits that on February 15, 1963, Tower entered into a written agreement (hereinafter referred to as the "Purchase Agreement") by and between Tower, Travelmarx, Inc. (hereinafter referred to as "Travelmarx"), Fugazy and Mr. Otto Marx, Jr., and defendant refers to the said Purchase Agreement for its terms and conditions.

THIRD: Denies each and every allegation contained in paragraph Seventh of the complaint, except admits that on or about February 28, 1963, all of the parties to the Purchase Agreement did execute and enter into a first amendment to the Purchase Agreement, and defendant refers to the said first amendment for its terms and conditions.

FOURTH: Denies each and every allegation contained in paragraph Ninth of the complaint, except admits that there was annexed as an exhibit to the Purchase Agreement, as amended, inter alia, a copy of the combined balance sheet of the Fugazy Travel Group of Tower as of September 30, 1962, a statement of combined income and expense and retained-earnings deficit of the Fugazy Travel Group of Tower for the year ended September 30, 1962, copy of the combined balance sheet of the Fugazy Group as of December 31, 1962, a copy of the balance sheet of Fugazy as of December 31, 1962, and a statement of income, profit and loss of Fugazy for the three months ended December 31, 1962.

AS AND FOR THE FIRST AFFIRMATIVE DEFENSE

FIFTH: The complaint fails to state a claim against defendant upon which relief can be granted.

AS AND FOR THE SECOND AFFIRMATIVE DEFENSE, COUNTERCLAIM AND BY WAY OF SETOFF

SIXTH: Tower Credit Corporation, formerly known as Tower Acceptance Corporation and as Tower Universal Corporation (hereinafter referred to as "Tower"), is a corporation duly incorporated by and existing under the laws of the State of Delaware, with its principal place of business in the State of Florida.

SEVENTH: Fugazy Travel Bureau, Inc. (hereinafter referred to as "Fugazy") is a corporation duly incorporated by and existing under the laws of the State of New York, with its principal place of business at 488 Madison Avenue, New York City, New York.

EIGHTH: The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

NINTH: On February 15, 1963, Tower entered into a written agreement (hereinafter referred to as the "Purchase Agreement") by and between Tower, Travelmarx, Inc. (hereinafter referred to as "Travelmarx"), Fugazy and Mr. Otto Marx, Jr., and defendant refers to the said Purchase Agreement for its terms and conditions.

TENTH: Plaintiff is the surviving corporation of the consolidation of March 26, 1963, between Fugazy and Travelmarx.

ELEVENTH: On or about February 28, 1963, all of the parties to the Purchase Agreement did execute and enter into a first amendment to the Purchase Agreement, and defendant refers to the said first amendment for its terms and conditions.

TWELFTH: Paragraph 8(a) of the Purchase Agreement, as amended, contains inter alia the following material covenant:

> "Fugazy Inc. will use its best efforts to cause to be elected as a director of Fugazy Inc. a person designated by Tower, subject to the reasonable approval of the Purchaser or Fugazy Inc.
>
> "Whether or not a designee of Tower is a director of Fugazy Inc., Fugazy Inc. will give Tower due notice of all meetings of the executive committee or any other committee of the Board of Directors of Fugazy Inc. and will allow a representative of Tower to be present at all such meetings."

THIRTEENTH: Paragraph 8(g) of the Purchase Agreement contains inter alia the following material covenant:

> "As soon as practicable after the end of each fiscal year, Fugazy Inc. will furnish to Tower a balance sheet and statements of

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> income and surplus of Fugazy Inc. and all subsidiaries as at the end of and for such year, on a consolidated or combined basis, all in reasonable detail, certified by the accountants referred to in section 8(f); and as promptly as practicable after the end of each of the first three quarters of each fiscal year, Fugazy Inc. will furnish to Tower corresponding financial statements, certified by the principal financial officer of Fugazy Inc., but which need not be audited, as of the end of and for each such quarter."

FOURTEENTH: Pursuant to the Purchase Agreement, Travelmarx, as Maker, delivered to Tower, as Payee, its promissory note in the amount of $900,000 dated February 28, 1963 (hereinafter referred to as the "Promissory Note") and a copy of which is annexed hereto as Exhibit A and made a part hereof.

FIFTEENTH: Tower is tne holder of the said Promissory Note.

SIXTEENTH: The said Promissory Note provides in pertinent part:

> "At the option of the payee or holder hereof this Note shall be accelerated and the entire principal sum thereof, together with accrued interest, shall become due and payable immediately, except as hereinafter specifically provided, upon the occurrence of any of the following events of default which shall remain uncorrected for a period of thirty days after receipt by the Maker, its successors or assigns, of due notice thereof specifying the event or events of default alleged to have occurred and the time or times of occurrence,...
>
> "B. A material breach of any material covenant on the part of the Purchaser or Fugazy, Inc. in the Purchase Agreement."

SEVENTEENTH: Fugazy, at all times alleged hereinafter, was and is in default on said Promissory Note in that, among other things, it has failed and refused to use

EXHIBIT A

its best efforts to cause to be elected as a director of Fugazy Inc. a person designated by Tower, and failed to give Tower due notice of all meetings of the executive committee or any other committee of the Board of Directors of Fugazy Inc. and to allow a representative of Tower to be present at all such meetings, as required by the material covenants in Section 8(a) of the Purchase Agreement, as amended.

EIGHTEENTH: Fugazy, at all times alleged hereinafter, was and is in default on said Promissory Note in that, among other things, it has further failed to furnish the various financial statements as required by the material covenants in Section 8(g) of the Purchase Agreement.

NINETEENTH: On or about January 27, 1965, notice of default was duly given to Fugazy.

TWENTIETH: On or about February 26, 1965, Fugazy notified Tower of its attempt to cure its default under Section 8(a) of the Purchase Agreement by the purported election of Tower's designee as a director of Fugazy on February 10, 1965.

TWENTY-FIRST: On or about March 1, 1965, Tower gave Fugazy further notice of default and demanded that the election of Tower's designee as a director of Fugazy not be effectually nullified through the failure to hold directors' meetings.

TWENTY-SECOND: The aforesaid defaults remained uncorrected for a period of thirty days after receipt by Fugazy of due notice thereof in that within the said period (1) no meeting of Fugazy's board of directors was held, and meetings of the executive committee of Fugazy's board of directors was held without notice to Tower as required

by Section 8(a) of the Purchase Agreement, as amended, thereby nullifying the purported election of Tower's designee, and (2) no financial statements were furnished which met the requirements of Section 8(g) of the Purchase Agreement.

TWENTY-THIRD: By virtue of the foregoing, Fugazy has failed and refused to perform all of the terms and conditions on its part to be performed under the Purchase Agreement.

TWENTY-FOURTH: On or about April 1, 1965, while Fugazy was in default as aforesaid, Tower notified Fugazy of its election to accelerate said Promissory Note and declare the principal amount thereof due and payable immediately in accordance with the Purchase Agreement.

TWENTY-FIFTH: Fugazy has failed and refuses and continues to refuse to make payment of any part of the principal sum of $900,000 although demand for such payment has been duly made.

TWENTY-SIXTH: Based upon the foregoing Fugazy is indebted to Tower in the amount of $900,000, with interest from April 1, 1965.

WHEREFORE, defendant Tower Credit Corporation demands (1) judgment against the plaintiff dismissing the complaint, and (2) judgment against the plaintiff in the amount of $900,000, with interest from April 1, 1965, together with the costs and disbursements of this action.

Dated: New York, New York
October 18, 1965

STRASSER, SPIEGELBERG, FRIED & FRANK

By: S/ Leon Silverman
A Member of the Firm
Attorneys for defendant Tower
Credit Corporation
120 Broadway
New York, N.Y. 10005

A-203

PROMISSORY NOTE

$900,000

New York, New York February 28, 1963

For value received, the undersigned maker, TRAVELMARX, INC. (the "Maker"), a New York corporation with its principal office c/o Marx & Co., Inc., 40 Wall Street, New York 5, New York, promises to pay to the order of Tower Universal Corporation, a Delaware corporation with its principal office at 331 Madison Avenue, New York, New York, the principal sum of $900,000, together with interest as provided below.

1. This Note has been issued pursuant to a Purchase Agreement dated the date hereof between the Maker, Tower Universal Corporation, Fugazy Travel Bureau, Inc. (hereinafter called "Fugazy, Inc.") and Otto Marx, Jr., and this Note is entitled to the benefit of all security referred to in said Purchase Agreement, including, without limitation, the security of the Pledge Agreement executed concurrently herewith.

2. All payments of principal and interest herein provided for are to be made at the offices of Tower Universal Corporation, 331 Madison Avenue, New York, New York, or such other place as shall be designated in writing by the payee or holder of this Note.

3. The principal of this Note shall be payable as follows:

> On the third through ninth anniversaries of this Note, the Maker shall pay to the holder hereof the greater of (a) $50,000 or (b) one-third of the consolidated net profits after taxes of the Maker in the previous fiscal year, as determined in accordance with generally accepted accounting principles. On the tenth anniversary of this Note, all unpaid principal shall be due and payable together with all interest accrued but unpaid to that date.

4. In determining the amount which would be payable under clause (b) in the preceding paragraph, each fiscal year of the Maker shall be considered separately and no adjustment shall be made by reason of the fact that in a prior year the amount paid under Clause (a) of the preceding paragraph exceeded the amount that would have been payable under Clause (b). Notwithstanding the foregoing, in determining Net Profits after Taxes for the purposes of said Cluase (b), the provision for taxes shall be the amount actually provided in accordance with generally accepted accounting principles, taking into

consideration tax loss carrybacks or carryovers.

5. Until the third anniversary of this Note, no interest shall accrue or be payable or unpaid principal hereof. Thereafter, interest on unpaid principal shall commence to accrue at the rate of

2% of unpaid principal until the fourth anniversary of this Note.

3% of unpaid principal until the fifth anniversary of this Note.

4% of unpaid principal until the sixth anniversary of this Note.

5% of unpaid principal thereafter until maturity.

On each anniversary of this Note after the third anniversary, all interest accrued to date on unpaid principal shall be due and payable together with the installment of principal then due and payable.

6. The Maker hereof may at its option prepay all or any part of the principal of this Note before such principal is due under the terms hereof without penalty. In the event of any such prepayment of principal the Maker shall also pay accrued interest on the amount prepaid up to the date of prepayment. All such prepayments shall be applied against and in reduction of the next installment or installments of principal due hereunder. The Maker shall have the option to discharge in full the principal of this Note by the payment of $300,000 less than the unpaid balance of the face amount hereof, if such amount is paid within thirty six months from the date hereof; or by the payment of $150,000 less than the unpaid balance of the face amount hereof if paid within forty eight months from the date hereof, plus in the latter case, interest to the extent provided herein, on the unpaid portion of the original face amount hereof.

7. At the option of the payee or holder hereof, this Note shall be accelerated and the entire principal sum thereof, together with accrued interest, shall become due and payable immediately, except as hereinafter specifically provided, upon the occurrence of any of the following events of default which shall remain uncorrected for a period of thirty days after receipt by the Maker, its successors or assigns, of due notice thereof specifying the event or events of default alleged to have occurred and the time or times of occurrence; provided, however, that no notice, demand or lapse of time shall be required in respect of the event of default specified in Subparagraph A:

A. Failure to make payment of any installment of principal or interest on this Note or on the Guaranteed Notes referred to in the Purchase Agreement.

B. A material Breach of any material covenant on the part of the Purchaser or Fugazy, Inc. in the Purchase Agreement.

C. Any assignment for the benefit of creditors by the Maker or Fugazy, Inc.

D. An application for dissolution by the Maker of Fugazy, Inc.

E. If by order of a court of competent jurisdiction, a receiver, liquidator or trustee of the Maker or Fugazy, Inc. or of any of their property shall be appointed and shall not have been discharged within 60 days; or if by decree of such a court the Maker of Fugazy, Inc. shall be adjudged bankrupt or insolvent, or any of their property shall have been sequestered, and such decree shall remain undischarged and unstayed for 60 days after the entry thereof; or if a petition to reorganize the Maker or Fugazy, Inc. pursuant to the Federal Bankruptcy Act or any other similar statute applicable to the Maker or Fugazy, Inc. as now or hereinafter in effect shall be filed against the Maker or Fugazy, Inc. and shall not be dismissed within 60 days after such filing; or the Maker or Fugazy, Inc. shall file a petition in voluntary bankruptcy under any provision of any bankruptcy law or shall consent to the filing of any bankruptcy or reorganization petition against it under any such law; or if (without limitation of the generality of the foregoing) the Maker or Fugazy, Inc. shall file a petition for an arrangement to reorganize pursuant to the Federal Bankruptcy Act or any other similar statute as now or hereafter in effect; or shall admit in writing its inability to pay its debts generally as they become due; or shall consent to the appointment of a receiver, trustee or liquidator of the Maker or Fugazy, Inc. or of all or any part of their property.

F. Entry of an adverse money judgment or money decree in an amount in excess of $500 against the Maker or against Fugazy, Inc. which remains unsatisfied or unbonded for a period of 30 days after demand made upon the judgment debtor by the payee or holder hereof.

8. In the event of (a) the occurrence of a national war or emergency, a travel embargo, strikes or

lockouts causing a shutdown of major airlines or steamship lines, or (b) the outbreak of plagues or hostilities in any part of the world, governmental acts or decrees, or any like event, significantly affecting travel to, from or in the United States; the effect of which is to cause a reduction of not less than fifty per cent in the consolidated gross sales of Fugazy, Inc., its successors or assigns, during the ninety day period immediately subsequent to the commencement of such event as compared with such gross sales during the corresponding ninety day period in the prior year, then in such case the dates subsequent to the commencement of such event on which installments of principal or interest are payable hereunder shall be postponed for a period of time equal to the duration of such event; and any such dates occurring during such ninety day period shall be postponed for such period of time as may be required to determine whether or not an additional postponement consistent with the provisions of this paragraph is appropriate.

Any liability of the payee, its successors or assigns, to the Maker, or its successors or assigns, arising out of or pursuant to the terms of the aforementioned Purchase Agreement or the Pledge Agreement executed concurrently herewith shall, upon the entry of a final judgment with respect thereto by a court of competent jurisdiction from which no appeal is pending or can be taken, be offset against and reduce the next installment or installments of principal due hereunder.

Except as otherwise expressly provided herein, any notice or demand required or permitted to be made or given by the payee or holder hereof pursuant to any provision hereof shall be deemed sufficiently made and given upon the receipt thereof by registered or certified mail addressed to the Maker at its address set forth above.

No officer, director or stockholder of the Maker shall have any liability hereunder, provided, however, that this provision shall not affect the obligations under the Purchase Agreement of any signatory thereof, his successors or assigns.

Should it become necessary to collect this Note through an attorney, the undersigned Maker hereby agrees to pay all costs of such collection including a reasonable attorney's fee.

Presentment for payment, notice of dishonor, protest and notice of protest are hereby waived. This Note may not be changed or terminated orally.

TRAVELMARX, INC.

By S/ Otto Marx, Jr.
President

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

FUGAZY TRAVEL BUREAU, INC.,

Plaintiff,

-against-

ERNST & ERNST,

Defendant.

AMENDED COMPLAINT

Index No.
04387/1968

Plaintiff, by its attorneys, LoFrisco Gallagher & Kenny, complaining of the defendant respectfully alleges as follows:

AS AND FOR A FIRST CAUSE OF ACTION

FIRST: Fugazy Travel Bureau, Inc. (hereinafter referred to as "Fugazy") is and at all times referred to in this complaint has been a corporation incorporated by and existing under the laws of the State of New York with its principal office in New York City, New York.

SECOND: Upon information and belief, Ernst & Ernst (hereinafter referred to as "Ernst") is and at all times referred to in this complaint was a partnership engaged in the practice of auditing and accounting in the State of New York.

THIRD: Upon information and belief, Tower Credit Corporation, formerly known as Tower Universal Corporation and Tower Acceptance Corporation (hereinafter referred to as "Tower") is a corporation duly organized and existing under the laws of the State of Delaware, with its principal office in the State of Florida.

FOURTH: From September, 1961 until the month of February, 1963, Tower was the owner of all of the outstanding

stock of Fugazy.

FIFTH: As of February 15, 1963, Tower entered into and became a party to a written agreement by and between Tower, Travelmarx, Inc. (hereinafter referred to as "Travelmarx"), a New York corporation with its principal office at 40 Wall Street, New York City, Fugazy and Mr. Otto Marx, Jr. (which agreement is hereinafter referred to as the "Purchase Agreement"), and which provided for the sale by Tower to Travelmarx of all of Tower's stockholdings in Fugazy, for a gross purchase price of $1,400,000.

SIXTH: Plaintiff is the surviving corporation of the consolidation of March 26, 1963 between Fugazy and Travelmarx.

SEVENTH: On or about February 28, 1963 all of the parties to the Purchase Agreement did execute and enter into a first amendment to the Purchase Agreement.

EIGHTH: During the year 1962 and as of the date of the Purchase Agreement Fugazy owned all of the outstanding common stock of the following corporations engaged in the travel business, to wit., Fugazy Travel Bureau, Inc. of Illinois; Fugazy Travel Bureau, Inc. of California; Fugazy Travel Bureau, Inc. of Dallas; Fugazy Travel Bureau, Inc. of Washington; Fugazy Travel Bureau, Inc. of San Francisco; Fugazy Travel Bureau, Inc. of Orange-Rockland; Tom Duffy Travel Service, Inc.; Percival Tours, Inc.; Westheim Travel Service, Inc.; and Westheim Travel Service, Inc. of Stamford; (which corporations together with Fugazy are hereinafter referred to as the "Fugazy Group").

NINTH: There was annexed as an Exhibit to the Purchase Agreement, as amended, a copy of the consolidated balance sheet of the Fugazy Group as of September 30, 1962 and a con-

solidated statement of income and expense of the Fugazy Group for the year ended September 30, 1962.

TENTH: The consolidated balance sheet of the Fugazy Group as of September 30, 1962 and the consolidated statement of income and expense of the Fugazy Group for the year ending September 30, 1962, as annexed as an Exhibit to the Purchase Agreement were duly certified by defendant Ernst as presenting fairly the combined financial position of the Fugazy Group at September 30, 1962, and the combined results of its operations for the year then ended in conformity with generally accepted accounting principles, and a copy of such certification, dated December 21, 1962 is annexed to this complaint as Exhibit A.

ELEVENTH: Upon information and belief, defendant Ernst had knowledge on December 21, 1962 that Tower had entered into discussions and negotiations with Mr. Otto Marx, Jr. and other prospective purchasers concerning the possible sale of Fugazy, and knew or should have known that its certification of the Fugazy Group's financial statements would be exhibited to and relied upon by Mr. Otto Marx, Jr. and other prospective purchasers.

TWELFTH: The consolidated balance sheet of the Fugazy Group as of September 30, 1962 did not present fairly the combined financial position of the Fugazy Group at September 30, 1962, in conformity with generally accepted accounting principles, in that such balance sheet overstated the net worth of the Fugazy Group as of such date by $167,205.71; and the consolidated statement of income and expense of the Fugazy Group for the year ended September 30, 1962 did not present fairly the combined results of its operations for the year then ended, in

conformity with generally accepted accounting principles, in that such statement of income and expense overstated the income of the Fugazy Group for the twelve months ended September 30, 1962 by $161,403.81.

THIRTEENTH: The certification of the Fugazy Group's financial statements by defendant Ernst was fraudulent in that defendant Ernst was grossly negligent and reckless in its examination and audit of the financial condition of the Fugazy Group and, in certifying such financial statements, did so without knowledge of the truth or falsity of such certification.

FOURTEENTH: In reliance on the certification of Ernst as aforesaid, Travelmarx did execute and enter into the Purchase Agreement and did consummate the transaction provided for therein by acquiring Tower's shareholdings in Fugazy, on or about February 28, 1963, for a gross purchase price of $1,400,000.

FIFTEENTH: As a direct result of the gross negligence and recklessness of defendant Ernst, and its fraudulent certification of the Fugazy Group's financial statements as of September 30, 1962, plaintiff has suffered damages in an aggregate amount equal to the difference between the amount paid for the acquisition of Tower's shareholdings in Fugazy and the value of that which was received by plaintiff, the exact amount of which difference is not presently known to plaintiff; no part of which has been paid, although duly demanded.

AS AND FOR A SECOND CAUSE OF ACTION

SIXTEENTH: Plaintiff repeats and realleges each and every allegation contained in paragraph First through Fifteenth hereof as if the same were set forth in full.

SEVENTEENTH: By reason of the above mentioned purchase agreement, Tower became jointly and severally liable to plaintiff for the damages sustained by plaintiff as a result of the misrepresentation of the net worth of the Fugazy Group as set forth in the consolidated balance sheet of the Fugazy Group as of September 30, 1962 as certified by the defendant Ernst.

EIGHTEENTH: By reason of such right of action against Tower, plaintiff retained the law firms of Kramer, Marx, Greenlee & Backus and Fowler, White, Collins, Gillen, Humkey and Trenam to represent it in the prosecution of plaintiff's claim against Tower until such claim was settled between plaintiff and Tower.

NINETEENTH: By reason of the foregoing, plaintiff has paid or has become obligated to pay to such law firms the sum of $81,893.12 representing legal fees and disbursements in connection with the prosecution and settlement of plaintiff's claim against Tower.

WHEREFORE, plaintiff demands judgment against defendant as follows:

(a) On the first cause of action in the amount as shown to be due thereon, with interest from February 28, 1963;

(b) On the second cause of action in the amount of $81,893.12 with interest;

(c) Together with the costs and disbursements of this action.

LoFRISCO GALLAGHER & KENNY
Attorneys for Plaintiff
Office & P. O. Address
10 East 40th Street
New York, New York 10016
686-8410

A 210

ERNST & ERNST

120 BROADWAY

NEW YORK 5, N.Y.

Board of Directors
Fugazy Travel Bureau, Inc.
New York, New York

We have examined the combined balance sheet of the Fugazy Travel Group (the travel agency subsidiaries) of Tower Universal Corporation as of September 30, 1962, and the related statement of combined income and expense and retained-earnings deficit for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, except that certain assets were carried at estimated values which exceeded the cost basis by $383,582 as described in Note C to the financial statements, and with the explanation in Note B regarding the classification of amounts receivable from and payable to the parent corporation the accompanying balance sheet and statement of income and expense and retained-earnings deficit present fairly the combined financial position of the Fugazy Travel Group of Tower Universal Corporation at September 30, 1962, and the combined results of its operations for the year then ended, in conformity with generally accepted accounting principles.

Ernst & Ernst

New York, New York
December 21, 1962

EXHIBIT A

BEST COPY AVAILABLE

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

FUGAZY TRAVEL BUREAU, INC., Plaintiff,	:	VERIFIED ANSWER AND COUNTERCLAIM
-against-	:	
ERNST & ERNST, Defendant.	:	

Defendant Ernst & Ernst through its attorneys, Davis Polk Wardwell Sunderland & Kiendl, answering the complaint herein, alleges as follows:

FIRST: Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs "First", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Ninth", "Eleventh", and "Fourteenth".

SECOND: Denies paragraphs "Twelfth", "Thirteenth", and "Fifteenth".

THIRD: Denies paragraph "Tenth", except admits that the document annexed to the complaint as Exhibit A is a true copy of an Accountants' Report made by defendant with respect to the combined balance sheet of the Fugazy Travel Group of Tower Universal Corporation as of September 30, 1962 and the related statement of combined income and expense and retained-earnings deficit of the Fugazy Travel Group for the year ended September 30, 1962.

FOR A COUNTERCLAIM

FOURTH: Between June 1, 1962 and December 31, 1962 defendant rendered certain accounting services for plaintiff

in connection with the examination of financial statements of the Fugazy Travel Group for the year ended September 30, 1962.

FIFTH: Plaintiff at all said times knew that said accounting services were being performed, and that defendant expected to be paid therefor, and accepted said accounting services and received the benefits thereof.

SIXTH: The fair and reasonable value of said services was $51,964.70, no part of which has been paid although payment thereof has been duly demanded.

WHEREFORE, defendant demands judgment against plaintiff dismissing the complaint herein and judgment against plaintiff in the sum of $51,964.70, with interest thereon, together with the costs and disbursements of this action.

Dated: New York, New York
July 26, 1965

DAVIS POLK WARDWELL SUNDERLAND & KIENDL
Attorneys for Defendant
1 Chase Manhattan Plaza
New York, New York 10005
HAnover 2-3400

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES A. RUSSELL, being duly sworn, deposes and says that he is a partner of defendant Ernst & Ernst in this action; that he has read the foregoing answer and counterclaim and knows the contents thereof; that the same are true of his own knowledge, except as to those matters stated therein to be alleged on information and belief, and that as to those matters he believes them to be true.

James A. Russell

Sworn to before me this
26th day of July, 1965

Elizabeth Bridy

ELIZABETH BRIDY
Notary Public, State of New York
No. 41-5453800 Queens County
Cert. filed in New York County
Term Expires March 30, 1966

A-216

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA.

TAMPA DIVISION.

IN PROCEEDINGS FOR THE REORGANIZATION
OF CORPORATIONS.

IN THE MATTER OF:

TOWER CREDIT CORPORATION, a Delaware corporation, and CONSUMER CREDIT CORPORATION, a Florida corporation,

Debtors

Case No. 66-171-Bky.T

FILED
JUL 7-1967
TAMPA, FLA

ORDER

THIS CAUSE coming on to be heard upon petition of GEORGE E. ALLEN, Successor Trustee of the above named debtors, verified the 20th day of June, A.D., 1967, and the Court having taken testimony and heard argument of counsel, and all parties at interest having had notice thereof and having had an opportunity to be heard, it is, upon consideration, the findings of this Court that:

1. It is to the best interest of debtor, TOWER CREDIT CORPORATION, that the promissory note of February 28, 1963, payable by TRAVELMARX, INC. to TOWER UNIVERSAL CORPORATION, be compromised, and that the best offer in compromise available to Trustee at the present time is the offer set forth in the letter of June 12, 1967, copy of which is attached to the petition.

2. That the Trustee is in possession of stipulations for dismissal of two of the pending appeals, leaving only the Fugazy appeal, which they agree to dismiss on closing.

3. That the Trustee has agreed that the sum of $250,000 of the proceeds be paid to WALTER E. HELLER and in the event the collateral position of the obligation of TOWER CREDIT CORPORATION and WALTER E. HELLER, pursuant to their financing arrangements are not in collateral balance as of the date

SPECIAL FILED AS PAPERS SUBMITTED
JUN 6 1968

payment is received from the Ernst & Ernst settlement, that such additional $35,000 will be paid to WALTER E. HELLER COMPANY, or such amount thereof as may be necessary to bring such account into collateral balance.

4. Upon representations made to this Court on behalf on FUGAZY TRAVEL BUREAU that the pending suit against Ernst & Ernst will be diligently pressed; it is

ORDERED, ADJUDGED and DECREED that the Trustee may accept the offer in compromise set forth in the letter of June 12, 1967, of FUGAZY TRAVEL BUREAU, MARX & CO., INC. and OTTO MARX, JR., for the payment of $265,000 cash, together with the assignment of the first $35,000 proceeds under the Ernst & Ernst suit, and from the proceeds thereof at time of closing, to authorize the payment of $250,000 thereof to WALTER E. HELLER & COMPANY, and agree with WALTER E. HELLER & COMPANY that should the financing arrangements between TOWER CREDIT CORPORATION and WALTER E. HELLER & COMPANY not be in collateral balance as of the date of the receipt of any proceeds under the Ernst & Ernst litigation, that all or such part thereof as may be necessary to bring the account into collateral balance shall be paid and delivered to the said WALTER E. HELLER & COMPANY.

DONE AND ORDERED at Tampa, Florida, this 7th day of July, A.D. 1967.

Joseph P. Lieb

United States District Judge

I certify the foregoing to be a true and correct copy of the original.
Wesley R. Thos, Clerk
United States District Court
Middle District of Florida
By: [signature]
Deputy Clerk

A-218

General Release

To All To Whom These Presents Shall Come or May Concern, Greetings:

Know Ye, That George B. Allen, as Successor Trustee in Proceedings for the Reorganization of Corporations in the United States District Court for the Middle District of Florida, Tampa Division, In The Matter of Tower Credit Corporation, a Delaware corporation, and Consumer Credit Corporation, a Florida corporation, et al., Debtors, No. 66-171-Bky-T, for and in consideration of the sum of One Dollar ($1) lawful money of the United States of America to him in hand paid by Fugazy Travel Bureau, Inc., a New York corporation, Marx & Co., Inc., a New York corporation, and Otto Marx, Jr., and other good and valuable consideration, the receipt whereof is hereby acknowledged, has remised, released and forever discharged, and by these presents does for himself, his heirs, executors, administrators and assigns and for each of the Debtors in the above-entitled Proceedings, their successors and assigns, remise, release and forever discharge the said Fugazy Travel Bureau, Inc., Marx & Co., Inc., and Otto Marx, Jr., and any guarantor of the claims hereinafter referred to, and their respective successors and legal representatives, of and from any and all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, covenants, contracts, controversies, agreements, promises, variances, damages, judgments, executions, claims and demands whatsoever at law or in equity which against said Fugazy Travel Bureau, Inc., Marx & Co., Otto Marx, Jr. and any guarantor of the claims

hereinafter referred to,

or any of the Debtors in the above-entitled Proceeding, ever had, now have, or hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these presents, including without limitation, all claims arising out of or relating to:

(a) a certain Purchase Agreement dated the 15th day of February, 1963 by and among Tower Universal Corporation, a Delaware corporation, Travelmarx, Inc., a New York corporation, Fugazy Travel Bureau, Inc., a New York corporation and Otto Marx, Jr.;

(b) the Promissory Note of Travelmarx, Inc., dated February 28, 1963 in the principal amount of $900,000 payable to the order of Tower Universal Corporation; and

(c) the Pledge Agreement executed and delivered on February 28, 1963 by Travelmarx, Inc., in favor of Tower Universal Corporation.

This release may not be changed orally.

IN WITNESS WHEREOF, the said George E. Allen, as Successor Trustee as aforesaid, has hereunto set his hand and seal the 22nd day of August, 1967.

S/ George E. Allen
George E. Allen, as Successor Trustee of Tower Credit Corporation, et al.

State of New York)
County of New York) ss.:

On the 22nd day of August, 1967 before me personally came George E. Allen, to me known and known to me to the be individual described in, and who executed, the foregoing instrument, and duly acknowledged to me that he executed the same.

S/Robert K. Adikys

A-220

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
SEP 12 1967
S.D. OF N.Y.

FUGAZY TRAVEL BUREAU, INC.,

Plaintiff,

-against-

TOWER CREDIT CORPORATION,

Defendant.

65 Civ. 2152

STIPULATION OF DISCONTINUANCE

IT IS HEREBY STIPULATED AND AGREED that the above entitled action be, and the same hereby is discontinued without costs to either party.

Dated: New York, New York
August 22, 1967.

SEP 12 1967

KRAMER, MARX, GREENLEE & BACKUS

By _____
A Member of the Firm
Attorneys for Plaintiff
Office & Post Office Address
29 Broadway
New York, New York 10006

STRASSER, SPIEGELBERG, FRIED & FRANK

By _____
A Member of the Firm
Attorneys for Defendant
Office & Post Office Address
120 Broadway
New York, New York 10005

SO ORDERED: 9/8/67

_____

JUN 6 1968
Numbered 70

TOWER-FUGAZY AGREEMENT

This AGREEMENT dated as of the 15th day of February, 1963 by and among FUGAZY TRAVEL BUREAU INC., a New York corporation, (hereinafter called "Fugazy"), Louis V. Fugazy (hereinafter called "Louis"), William D. Fugazy (hereinafter called "William"), and Tower Universal Corporation, a Delaware corporation, (hereinafter called "Tower")

W I T N E S S E T H :

WHEREAS, Fugazy, Louis, William and Tower have entered into an agreement dated July 26,1961 (hereinafter called the "July 26,1961 Agreement")relating to the exchange of stock of Fugazy held by Louis and William for shares of Class A stock to be issued by Tower (the name of which was then "Tower Acceptance Corporation"); and

WHEREAS, such agreement of July 26,1961 was amended by letter agreements dated July 27,1961 and October 13,1961; and

WHEREAS, Louis and William received under the July 26,1961 Agreement an aggregate of 44,361 shares of Class A stock of Tower, of which 10,000 shares are held for their account in escrow by Saxe, Bacon & O'Shea pursuant to the provisions of Section 2(a) of said Agreement; and

WHEREAS, William is a party to an Employment Agreement with Fugazy dated November 1,1961 under which Tower has guaranteed the performance of certain obligations of Fugazy; and

WHEREAS, Tower proposes to sell all of the outstanding shares of Fugazy to a third party and in so doing will be obliged to make certain representations and warranties covering Fugazy and affiliated corporations.

WHEREAS, the parties hereto wish to make a further amendment to the July 26,1961 Agreement and to terminate Tower's guarantees under the aforesaid employment agreement.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual covenants herein contained, it is hereby agreed as follows:

1. All agreements and releases contained herein are subject to the consummation of the Closing of the Agreement to be executed among Tower, Travelmarx, Inc., Fugazy and Otto Marx, Jr. (hereinafter called the "Purchase Agreement"), a copy of which is attached as Exhibit A hereto, including the satisfaction of any conditions subsequent set out in such Purchase Agreement or amendments thereto. If such Closing is not consummated or if such conditions subsequent are not satisfied (or waived) for any reason whatever, this Agreement and all provisions hereof shall be null and void.

2. Tower hereby releases Fugazy, Louis and William from any and all claims or demands, past, present or future, which Tower may have against Fugazy, Louis and William pursuant to the representations and warranties contained in Section 6 of the July 26,1961 Agreement.

3. The provisions of Section 2 of the July 26, 1961 Agreement are hereby deleted and shall be of no further force and effect. In lieu thereof, it is hereby agreed that Louis and William hereby accept the total of 44,361 shares referred to in the third recital of this Agreement as payment in full for the shares of Fugazy delivered to Tower upon the closing of the July 26,1961 Agreement as amended, and in full satisfaction of any and all claims or demands, past, present or future, of any character or nature which Louis or William may have against Tower arising out of such Agreement as amended; and hereby release Tower from any and all such claims or demands.

4. Tower hereby waives and releases any and all claims or demands, past, present or future, which it may have against Louis or William for the return of shares of Class A stock of Tower pursuant to Section 2 of the July 26,1961 Agreement and the amendment thereto dated October 13,1961.

5(a) Louis and William agree that the 10,000 shares of Class A stock of Tower held in escrow by Saxe, Bacon & O'Shea shall continue to be held by such firm in escrow pursuant to the July 26,1961 Agreement, as amended by this Agreement, as security for any claims which Tower may have against Louis or William pursuant to the representations, warranties and indemnity agreement made by them pursuant to paragraph 6 hereof. In the event of an arbitration award in favor of Tower with respect to any claim against Louis or William for which such shares are held as security, or in the event that any such claim is reduced to final judgment in a court of competent

jurisdiction from which no appeal is pending or can be taken, the escrow agent shall be authorized to deliver to Tower such number of shares as may be necessary to satisfy such award of judgment, valuing such shares at the closing price of the Tower Class A stock on the American Stock Exchange on the date that such award or judgment is entered. Upon the termination of the escrow, any balance of shares remaining thereunder shall be delivered to Louis or William, their successors or assigns as their interests may appear.

(b) The aforesaid escrow shall terminate upon the delivery to Tower of a release from all of the parties to the Purchase Agreement other than Tower, in which Tower is released from all further claims or demands, past, present or future, of such other parties under the Purchase Agreement other than claims under Section 11 (b) thereof; or upon the latest of (i) the expiration of the applicable periods of limitations with respect to all of such claims and demands, (ii) the final disposition of all litigation respecting such claims or demands timely commenced; or (iii) the due disposition of funds held in escrow under Section 12(g) of the Purchase Agreement as the result of such claims or demands unless such funds are held in escrow as a result of claims or demands arising under Section 11 (b) of the Purchase Agreement.

(c) Louis or William shall have the right, at any time and from time to time, to obtain the release of the shares of Class A stock of Tower held for their account in escrow under paragraph (a) of this Section, upon concurrently depositing with the escrow agent readily marketable securities which have a fair market value at such time of at least $50,000. The valuation

of the proposed substituted collateral is to be determined by the Board of Directors of Tower, and such valuation, if made in good faith, shall be conclusive.

(d) In the event that Saxe, Bacon & O'Shea shall cease to serve as counsel for Tower, Tower shall have the right to direct Saxe, Bacon & O'Shea to deliver the shares held in escrow to such other firm of attorneys as may then be serving as general counsel for Tower, which firm shall hold such shares as substitute escrow agent hereunder. Notice of such substitution and the acceptance of the escrow by the substituted escrow agent shall be given in writing to Louis and William simultaneously with such substitution.

6(a) Louis and William represent and warrant that, insofar as the representations and warranties set forth in Section 1 [except Paragraphs (c), (d), (e) and (q)] of the Purchase Agreement relate to the Fugazy Group Corporations (as defined in said Purchase Agreement) such representations and warranties are true and correct; and that Tower will suffer no loss, damage or expense of any character, including attorney's fees and expenses, as a result of making such representations and warranties. It is understood and agreed that Louis and William shall have no liability to Tower by reason of any liability which Tower may incur under the provisions of Section 11(b) of the Purchase Agreement.

(b) Louis and William further represent and warrant that any representations and warranties concerning the aforesaid corporations (except as indicated in Paragraph (a) of this Section 6) made in any certificates or letters delivered by officers of Tower at the Closing of the Purchase Agreement, if such certificates or letters are delivered with the written consent of Louis and William, will be true and correct and that

Tower will suffer no loss, damage or expense, including attorney's fees and expenses, as a result of delivering such certificates or letters insofar as they relate to the aforesaid corporations.

(c) Notwithstanding the release of claims and demands set forth in Section 2 hereof, the representations and warranties of Louis and William in Paragraphs (a) and (b) of this Section 6 shall be applicable regardless of the time of occurrence of the events or state of facts as a result of which the representations and warranties in Section 1 of the Purchase Agreement are not true and correct.

(d) Louis and William further agree to cross-indemnify Tower against any liability which Tower may incur under the provisions of Section 11 (a) of the Purchase Agreement.

(e) For the purposes of this paragraph, offsets made against the Secured Note referred to in the Purchase Agreement shall be considered as a loss, damage or liability incurred by Tower, except insofar as such offsets arise out of a claim against Tower under Section 11(b) of the Purchase Agreement.

(f) Notwithstanding anything contained in the foregoing provisions of this Section 6, Louis and William shall have no liability or responsibility of any character to Tower by reason of any liability which Tower may incur as the result of an undisclosed liability of Tom Duffy Travel Service Inc., Percival Tours, Inc., Travel, Inc., Westheim Travel Service Inc., or Westheim Travel Service Inc. of Stamford which arose out of acts or omissions occurring prior to the acquisition of control of the respective corporation by Tower and of which neither Louis nor William had actual knowledge prior to the date hereof and which they did not disclose to officers or directors of Tower.

7. William does hereby release Tower from any and all claims or demands, past, present or future, of any character which he has or may have against Tower pursuant to the Employment Agreement dated November 1,1961 referred to in the recitals to this Agreement.

8. Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration, such arbitration to be held in New York City in accordance with the rules of the American Arbitration Association and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

9. All rights and remedies of Tower hereunder and under any other document made pursuant to or incidental to this Agreement or otherwise shall be cumulative and severable. The exercise by Tower of any one or more rights or remedies hereunder or thereunder shall not preclude Tower from exercising any other of such rights or remedies hereunder or thereunder at the same or any other time or times; nor shall the invalidity of any term or provision hereof or of any such document or instrument render invalid any other term or provision thereof or hereof.

10. All notices, requests, consents and other communications hereunder shall be in writing and shall be delivered by hand or mailed by registered or certified mail, postage prepaid, addressed as follows:

If to Tower:

Tower Universal Corporation
331 Madison Avenue
New York, N.Y.

with a copy to: Strasser, Spiegelberg, Fried & Frank
120 Broadway
New York, N.Y.

If to Fugazy:

President,
Fugazy Travel Bureau Inc.
351 6th Avenue
New York, N.Y.

with a copy to: Kramer, Marx, Greenlee & Backus
29 Broadway
New York, N.Y.

If to Louis or William Fugazy:

c/o Fugazy Travel Bureau Inc.
351 6th Avenue
New York, N.Y.

with a copy to: Joseph F. Romano, Esq.
277 Broadway
New York, N.Y.

Any party shall have the right to specify in writing a change of address to which subsequent notices to such parties shall be given.

11. This Agreement supersedes all prior negotiations and contains the entire understanding between the parties. It may be modified only in writing signed by the party against whom the modification is asserted.

12. This Agreement shall be interpreted in accordance with the laws of the State of New York.

13. This Agreement shall inure to the benefit of and be binding upon the heirs, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement this day of February, 1963.

FUGAZY TRAVEL BUREAU INC.

By _____

ATTEST:

_____

_____
LOUIS V. FUGAZY

_____
WILLIAM D. FUGAZY

TOWER UNIVERSAL CORPORATION

By _____

ATTEST:

_____

Assignment

KNOW ALL MEN BY THESE PRESENTS, that GEORGE E. ALLEN, as Successor Trustee in Proceedings for the Reorganization of Corporations in the United States District Court for the Middle District of Florida, Tampa Division, In the Matter of Tower Credit Corporation, a Delaware corporation, and Consumer Credit Corporation, a Florida corporation, et al, Debtors, No. 66-171-Bky-T (hereinafter called the "Assignor"), for and in consideration of the sum of One Dollar ($1) lawful money of the United States of America to him in hand paid by MARX & CO., INC., a New York corporation (hereinafter called the "Assignee"), and other good and valuable consideration, the receipt whereof is hereby acknowledged, has sold, assigned, transferred and set over, and by these presents does hereby sell, assign, transfer and set over unto the Assignee, its successors and assigns, without recourse, all claims which the Assignor now has or may at any time hereafter have against William D. Fugazy and Louis V. Fugazy, including, without limitation, all rights which the Assignor now has or may at any time hereafter have against William D. Fugazy and Louis V. Fugazy under or arising out of the Agreement dated as of February 15, 1963 (hereinafter called the "Tower-Fugazy Agreement"), by and among Fugazy Travel Bureau, Inc., a New York corporation, Louis V. Fugazy, William D. Fugazy and Tower Universal Corporation, a Delaware corporation, as amended, and all rights which the Assignor now has or may at any time hereafter have in and to any and all shares of stock of Tower Credit Corporation owned by William D. Fugazy and Louis V. Fugazy and held by the Assignor as collateral security for the obligations of William D. Fugazy and Louis V. Fugazy under the Tower-Fugazy Agreement.

This Assignment shall be construed in accordance with and governed by the laws of the State of New York.

This Assignment may not be changed orally but only by an instrument in writing signed by the person against whom enforcement of any waiver, change, modification or discharge is sought.

This Assignment may be executed in any number of counterparts, each of which for all purposes shall be deemed to be an original.

IN WITNESS WHEREOF, the said GEORGE E. ALLEN, as Successor Trustee as aforesaid, has hereunto set his hand and seal the 22 day of August, 1967.

(L.S.)

George E. Allen, as Successor Trustee of Tower Credit Corporation, et al.

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

On the 22 day of August, 1967, before me personally came GEORGE E. ALLEN, to me known and known to me to be the individual described in, and who executed, the foregoing instrument, and he duly acknowledged to me that he executed the same.

Robert K. Adikes
Notary Public

ROBERT K. ADIKES
Notary Public, State of New York
No. 31-0019350
Qualified in New York County
Cert. filed with Queens Co. Clk
Commission Expires March 30, 1969

June 26, 1975

128

A-232

Filed 8-8-75

DEFENDANTS' NOTICE OF MOTION FOR JUDGMENT NOV

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al.,

Plaintiffs,

-against-

THE DINERS" CLUB, INC., et al.,

Defendants.

-against-

WILLIAM D. FUGAZY, et ano.,

Third-Party
Defendants.

Consolidated
Case
72 Civ. 4324

70 Civ. 3064
(RJW)

NOTICE OF MOTION

WILLIAM D. FUGAZY, et ano.,

Plaintiffs,

-against-

THE DINERS" CLUB, INC., et al.,

Defendants,

-against-

MARX & CO., INC., et al.,

Additional
Defendants on
the Counterclaims.

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavits of Joseph J. Santora, sworn to on June 26, 1975, and the exhibits submitted therewith, and upon all prior pleadings,

papers and proceedings submitted to the Court in this action, defendants will move before this Court in the Courtroom of the Honorable Robert J. Ward, U.S.D.J., Room 2104 of the United States District Courthouse for the Southern District of New York at Foley Square in the Borough of Manhattan, City of New York on such date as may be determined by the Court, for judgment in favor of defendant, The Diners' Club, Inc., on plaintiffs' contract claim notwithstanding the verdict, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, or alternatively, if such relief is denied, for a new trial on the contract claim or for an order granting that plaintiffs be required to remit all damages awarded to them on said claim, pursuant to Rule 59 of said Rules, and for judgment in favor of defendants as against each and every plaintiff on defendants' counterclaims, notwithstanding the verdict, pursuant to Rule 50(b) of said Rules, or, alternatively, if such relief is denied, to obtain a new trial on the counterclaims, pursuant to Rule 59 of said Rules, along with such other and further relief as the Court may deem just and proper.

Dated: New York, New York
June 26, 1975

Yours, etc.,

HARDEE BAROVICK KONECKY & BRAUN
Attorneys for Defendants
One Dag Hammarskjold Plaza
New York, New York 10017
Telephone: (212) 754-1430

By: _____
A Member of the Firm

TO: HARRIS, FREDERICKS & KOROBKIN
1271 Avenue of the Americas
New York, New York 10020

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
299 Park Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants.

-against-

WILLIAM D. FUGAZY, et ano.,

Third-Party
Defendants.

WILLIAM D. FUGAZY, et ano.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

MARX & CO., INC., et al.,

Additional
Defendants on
the Counterclaims.

Consolidated
Case
70 Civ. 3064

72 Civ. 4324 (RJW)

AFFIDAVIT
IN SUPPORT
OF MOTION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH J. SANTORA, being duly sworn, deposes and says:

1. Deponent is a member of the bar of this Court and the State of New York, and is a member of the firm of Hardee Barovick Konecky & Braun, counsel for defendants herein. Deponent was trial counsel for defendants during the trial of this action and is fully familiar with the facts and circumstances set forth herein.

2. This affidavit and the accompanying memorandum of law are submitted with leave of the Court to support and supplement the oral motions of defendants The Diners' Club, Inc. ("Diners") and Diners' World Travel, Inc. ("DWT") made to the Court on May 28, 1975 seeking relief as hereinafter set forth. Copies of exhibits received in evidence which are referred to herein have been separately bound and are submitted to the Court herewith. Also submitted herewith and annexed hereto is deponent's supplemental affidavit relating to the letters dated June 23, 1975 submitted to the Court on the subject of plaintiffs' proposal of a rebuttal witness and deponent's objection thereto.

The Background of The Instant Motion

3. The trial in this action commenced on May 6, 1975. On May 14, plaintiffs' case was concluded and defendants moved for a directed verdict based on plaintiffs' failure to state a prima facie case with respect to each of their three claims - alleged fraud occurring in 1967, alleged fraud occurring in 1968, and alleged breach of contract occurring in 1969 (hereinafter

"the contract claim"). On May 15, the Court dismissed the 1967 fraud claim and denied defendants' motion with respect to the remaining two claims. Defendants then commenced their case in defense of plaintiffs' remaining claims and in prosecution of the counterclaims, and concluded on May 23.

4. On May 23, plaintiffs presented on "rebuttal" the testimony of Mr. Friedman and the parties rested. Defendants moved for a directed verdict on each of plaintiffs' remaining claims and plaintiffs moved on the counterclaims. Both motions were denied by the Court.

5. Closing statements and charges to the jury were made on May 27. On May 28, the jury returned its verdict, denying plaintiffs' 1968 fraud claim and the counterclaims, and awarding plaintiffs damages in the amount of $533,000 on their contract claim. Defendants orally moved for judgment notwithstanding the verdict with respect to plaintiffs' contract claim and the counterclaims, and for a new trial. The Court reserved decision on the motions subject to the receipt of formal papers. At defendants' request, the Court directed that papers in support of the motion be submitted by June 18 and subsequently granted an extension until June 26.

The Instant Motion

6. Defendant Diners, pursuant to F.R.C.P. Rules 50(b) and 59, seeks judgment in its favor on plaintiffs' contract clai

notwithstanding the verdict, and seeks a new trial on the grounds that:

a) plaintiffs failed to produce sufficient evidence to meet their burden of proof;

b) the verdict of the jury necessarily involved an erroneous determination of law;

c) the evidence was overwhelmingly in favor of Diners.

7. In the event the requested relief is denied, Diners seeks alternatively, pursuant to F.R.C.P. Rules 50(b) and 59, to obtain a new trial on the contract claim or to obtain an order directing that plaintiffs be required to remit the damages awarded to them on said claim as hereinafter set forth.

8. Defendants, pursuant to F.R.C.P. Rules 50(b) and 59, seek judgment against each and every plaintiff on their counterclaims, notwithstanding the verdict and seek a new trial on the grounds that:

a) the said counterclaims were clearly established and plaintiffs presented no evidence or only insufficient evidence in defense thereof, and the jury's verdict included erroneous determinations of questions of law;

b) the evidence on the said counterclaims was so

overwhelmingly in favor of defendants that the verdict should be set aside.

9. In the event the requested relief is denied, defendants seek alternatively, pursuant to F.R.C.P. Rules 50(b) and 59, to obtain a new trial on the said counterclaims for the reasons hereinafter stated.

PLAINTIFFS' CONTRACT CLAIM

Introductory Statement

10. In 1967, Diners purchased the assets of plaintiffs' company, Fugazy Travel Bureau, Inc. ("FTB"). The Acquisition Agreement (*Ex. 5) provided, inter alia, that in certain circumstances and subject to certain conditions plaintiffs could request Diners to register the shares of Diners stock received by plaintiffs under the Acquisition Agreement (hereinafter "the agreement"). At that time, William Fugazy was a director of Diners and he, Marx and Louis Fugazy were directors of Diners/Fugazy Travel, Inc. ("DFT"), the former name of defendant DWT. The Fugazys were officers of DFT in April 1969, and from April, 1968 through February, 1969, William Fugazy was president of Diners as well.

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*The letters "Ex." followed by letters and numerical figures and "Tr." followed by numerical figures are used herein to denote references to exhibits received in evidence and pages in the trial transcript, respectively.

11. Plaintiffs' so-called contract claim was not separately pleaded in the complaint herein, but was included in the complaint, as part of plaintiffs' Rule 10b-5 or fraud claims. Paragraph 11(h) of the complaint alleges in pertinent part, that

> "Pursuant to the . . . Purchase Agreement . . . Diners filed a registration statement . . . on August 28, 1969, failed and refused to use its best efforts to cause such registration statement to become effective".

In the pre-trial order submitted in this case, plaintiffs also allege that Diners filed a registration statement on August 28, 1969 "but failed and refused to use its best efforts" to cause it to become effective. (par. 9) In neither the complaint nor the pre-trial order did plaintiffs allege that Diners failed to promptly file the registration statement.

12. In the pre-trial order, defendants denied liability to plaintiffs on the allegations in the complaint and further alleged that plaintiffs suffered no damage from the failure of the registration statement to become effective. (par. 22, 23)

The Presentation of Plaintiffs' Case

13. In support of their contract claim, plaintiffs put the agreement (Ex. 5) in evidence. No testimony was elicited concerning the agreement, but plaintiffs' counsel simply read a portion of Section 10.2(b) aloud to the jury.

14. Plaintiffs also put in evidence their request for registration under the agreement dated April 16, 1969 (Ex. 27) and Mr. Faunce's copy of that letter (Ex. 28). In requesting registration, plaintiffs advised Diners as follows: (Ex. 27)

> "In connection with such registration, the undersigned are prepared and offer to advance you an amount sufficient to reimburse you for one-half of all registration fees and expenses as provided in said paragraph 10.2(b) and to furnish the indemnity agreement referred to therein." (emphasis added)

15. Plaintiffs did not offer any pertinent testimony concerning Exhibits 5, 27 or 28 apart from identifying the documents. In addition, plaintiffs put in evidence, without pertinent testimony, the notice for Diners' annual shareholders meeting (Ex. 13), a memorandum dated April 24, 1969 from Mr. Johnson to Mr. Herd (Ex. 29), the registration statement filed by Diners on August 28, 1969 (Ex. 30), Diners' 1969 annual report to shareholders (Ex. 31), a letter from the Securities and Exchange Commission (hereinafter "the S.E.C.") dated October 16, 1969 commenting on the registration statement (Ex. 39), a letter of Diners' counsel dated October 20, 1969 (Ex. 40), and a list of price quotations for Diners' common stock. (Ex. 48).

16. Plaintiffs also put in evidence a letter from Diners' counsel dated January 29, 1970 to the selling shareholders involved in the registration statement enclosing a letter from

the S.E.C. asking Diners to withdraw the registration statement (Ex. 33), Faunce's letter dated February 18, 1970 advising the S.E.C. that Diners was withdrawing the registration statement (Ex. 41), Marx's letter dated March 11, 1970 (Ex. 42) and the response of Diners' counsel dated March 16, 1970 providing Marx with the opinion he had requested in lieu of registration (Ex. 43). With respect to Exhibits 33 and 42, Marx testified that he did not wish to withdraw the registration statement at that time and did not recall agreeing to withdraw it. (Tr. 701).

17. At plaintiffs' counsel's request, the Court took judicial notice, over defendants' objection, of an annual report of the Securities and Exchange Commission (Ex. 54 for identification) which indicated that for the period from July, 1969 through June, 1970, the median time for registration statements to become effective after filing was 70 days. Then plaintiffs' counsel read aloud from some of the exhibits referred to in paragraphs 14-16 above.

18. Although all four plaintiffs took the stand with respect to plaintiffs' three claims then in suit, not one of them testified as to any act or omission by Diners to support a claim that Diners failed to use its best efforts to cause the registration statement to become effective after its filing on August 28, 1969. In fact, none of the plaintiffs testified as to any alleged act or omission by Diners in conflict with or outside the scope of the terms of the agreement in any way.

19. The only testimony even remotely related to that subject was Mr. William Fugazy's vague statement that he "felt" Mr. Faunce and Mr. Johnson were trying to delay the registration statement. (Tr. 310-313) However, when asked upon cross-examination, Fugazy could provide no specific testimony to support such a "feeling". Indeed, Mr. Marx testified that Diners could do nothing further to process the registration statement subsequent to the August 28, 1969 filing until Diners received comments from the S.E.C., which was "normal" (Tr. 874), and plaintiffs' Exhibits 39 and 40 establish that Diners did not receive the initial S.E.C. comments until October 20, 1969.

20. It was established that Mr. Fugazy, as a director of Diners participated in the efforts to file and process the registration statement, signed the registration statement filed on August 28, 1969, participated in activities and attended meetings in connection with Diners' attempts to comply with the S.E.C. comments. (Tr. 310, 300-301; Ex. 30) Yet, neither Mr. Fugazy nor any other plaintiff testified that plaintiffs ever made any objection to or any comment relating to Diners' efforts to cause the registration statement to become effective prior to March, 1970.

21. In fact, Mr. Fugazy admitted that Diners had sincerely tried to comply with the S.E.C. (Tr. 314-17) and he did not think anyone at Diners was purposely trying not to register the stock. (Tr. 310) Furthermore, he admitted that

he did not think the Diners Board of Directors was trying to do anything improper in connection with the registration statement and that he, as a director, was in a position to know if they were. (Tr. 310)

22. Mr. Fugazy also testified that compliance with the S.E.C. comments was a "monumental task" and, in connection with Diners' efforts to achieve that monumental task, testified, as follows: (Tr. 315-17)

> "No, I believe Diners Club tried to comply with the SEC request. It got to be a very slow and tedious problem. . . . I believe that up to the time of the Continental tender that an effort was being made to comply with the SEC." (Tr. 317)

23. On cross examination, it was established through Mr. Marx that plaintiffs did not consider registration of their shares by Diners a necessity, and were amenable to any method of getting some money. (Tr. 872) Mr. Fugazy testified that he and Mr. Marx may even have agreed to withdraw the registration statement. (Tr. 309) Mr. Marx testified that he agreed to withdraw the registration statement in return for other consideration, but his proposal was rejected by Diners. Marx recalled that plaintiffs made another proposal in lieu of registration which Diners also rejected. (Tr. 875-76)

24. On cross examination, Mr. Marx admitted that plaintiffs had never paid to Diners any portion of the expenses

connected with the registration statement. (Ex. P, Tr. 877-79) This, of course, was in direct contradiction of plaintiffs' advice to Diners that they would advance to Diners an amount sufficient to pay for half the fees and expenses connected with the entire registration. (Ex. 27)

25. Throughout the presentation of plaintiffs' entire case, no shred of evidence was adduced and no allegation was made that Diners had failed to promptly file the registration statement. Accordingly, although deponent questioned each plaintiff on the allegation that Diners had failed to use its best efforts to cause the registration statement to become effective after it had been filed, there was no need to cross examine plaintiffs on the facts leading up to the August 28 filing, and no such cross examination was undertaken. The situation remained the same when plaintiffs were called and examined on defendants' case.

Defendants' Motion
For A Directed
Verdict At The
Close of Plaintiffs' Case

26. At the close of plaintiffs' case, it seemed clear that plaintiffs had completely failed to make out a prima facie case that Diners had breached the agreement by failing to use its best efforts after the August 28 filing. Section 10.2(b) of the agreement, upon which plaintiffs' claim is predicated, provides as follows:

"Unless Diners shall have received an opinion from its counsel that registration is not required, or if Diners and all such registered holders, together proceeding expeditiously and in good faith after such notice, cannot obtain from the Securities and Exchange Commission a 'no-action' letter with respect to the sale of such shares, then Diners shall promptly file a registration statement and use its best efforts to cause such registration statement to become effective." (emphasis added)

27. Section 10.2(b) specifically authorized Diners to include in the registration statement such other shares "as it may desire", and further provided that, notwithstanding anything to the contrary,

"Diners need not file any such registration statement until it may lawfully use its regularly prepared fiscal year end financial statements, as a part of such registration statement."

28. Section 10.2(b) also provides the following:

"The notifying holders shall pay Diners in advance an amount sufficient to reimburse Diners for one-half of all registration fees, printing costs, auditing fees (but only in excess of normal fees paid by Diners for its fiscal year end audit), legal fees and all other incidental out-of-pocket expenses incurred in connection with such registration statement." (emphasis added)

Section 10.2(c) of the agreement provides the following:

"Any registration by Diners of shares... under paragraph (a) or (b) of this Section 10.2, shall be conditioned upon the holders of such shares delivering to Diners...an indemnity agreement, in customary form, indemnifying such persons against liabilities based on untrue statements in or omissions from the registration statement made in reliance on information furnished to Diners by such holders." (emphasis added)

29. Thus, the express language of the agreement provides that plaintiffs' right to seek registration for their shares and Diners' obligation to file a registration statement arose only after

1) notification by plaintiffs,

2) the mutual cessation or abandonment of any activities seeking alternate methods to obtain a no-action letter in lieu of registration,

3) the ability of Diners to use its regularly prepared fiscal year end financial statements,

4) the advance payment to Diners by the notifying holders of an amount sufficient to reimburse Diners for one-half the fees and expenses connected with the registration statement, and

5) the delivering by the notifying holders to Diners of an indemnity agreement in customary form.

Only after the filing of the registration statement did Diners' obligation to use its best efforts arise.

30. Plaintiffs clearly failed to offer any evidence relating to the abandonment of the activities in lieu of registration or the delivery of the indemnity agreement. Plaintiffs had, in fact, admitted the non-performance of their obligation to make the advance payment of registration expenses (Ex. P; Tr. 877-79). Thus, plaintiffs had failed to prove that Diners

had any obligation to file the registration statement or use its best efforts thereafter to cause it to become effective. In addition,plaintiffs had offered absolutely no evidence relating to any alleged failure of Diners to use its best efforts in breach of the agreement, and the only evidence adduced on plaintiffs' case actually established that Diners had not failed to use its best efforts. (par. 20-22 above).

31. Thus, in moving for directed verdict, defendants contended that plaintiffs' claim was "hanging in the air without one piece of supporting evidence" and asked that it "be stricken at this point" (Tr. 910). The Court responded: "I think they are in trouble on that one, frankly,for reasons even beyond what you have adverted to" (Tr. 910). Although the Court denied the motion at that time, it indicated it would consider the matter again "at the close of all of the evidence" (Tr. 924).

The Presentation
Of Defendants' Case

32. In presenting their case, defendants put in evidence testimony and documentary evidence on plaintiffs' 1968 fraud claim and defendants' counterclaims as well as the contract claim which is the subject of the instant motion. The evidence presented by defendants conclusively established that plaintiffs were completely precluded from any recovery on their contract claim.

33. Defendants established that the activities to seek alternatives to registration, the cessation of which was an indispensable predicate to Diners' obligation to use best efforts, continued well into June (Ex. MMM, NNN) and even later (Tr. 872-73), and that such activities were primarily pursued by plaintiffs in an attempt to avoid the expenses and effort of a registration statement.

34. On May 14, 1969, Mr. Marx met Mr. Faunce, president of Diners, and proposed alternatives to registration. (Ex. 55) Marx had previously met with Diners' counsel, Mr. Weber, to discuss alternatives to registration. (ex. 55) In a letter, dated May 19, 1969, Marx set forth his proposal in detail so that plaintiffs' shares "would not have to be registered at this time". (Ex. MMM) Marx pointed out to Faunce that

> "This plan would eliminate the costs of a registration statement and the disclosure of a great deal of complicated information."

Marx also invited Diners to make additional suggestions for alternative proposals in lieu of registration. He then advised Mr. Faunce that upon his return from his impending trip to Europe "a decision can be made to either register our shares or take some action on some alternative plan". (Ex. MMM)

35. On June 12, 1969, Marx wrote to the Fugazys to tell them that upon his return from Europe he had been advised by Diners that its Board of Directors, of which Mr. William Fugazy was a member, had disapproved Marx's proposed alternative plan.

(Ex. NNN) Marx told the Fugazys that registration and sale of their shares was not particularly advantageous to them at that time and reminded them that "under our agreement we pay for half of the cost of such registration statement". (Ex. NNN) Although Marx advised the Fugazys that he had agreed to try to register the shares (Ex. NNN), shortly thereafter, on June 17, he wrote to Harold Johnson (Ex. OOO) enclosing a copy of his May 9 proposal for Johnson's consideration.

36. Mr. Marx admitted that he had further discussions concerning possible alternatives to registration with various officials and representatives of Diners including Messrs. Weber, Flug, Hays and Bloomingdale through July and August (Tr. 872-73).

37. Section 10.2(b) of the agreement specifically authorized Diners to include in the registration statement for plaintiffs' shares such other shares as Diners "may desire". The agreement provides no limit as to the number of such other shares or shareholders, and no limitations as the time, expense or effort which could be involved in including such other shares. In July, 1969, Diners authorized the inclusion of $10 million worth of other shares in the registration statement pursuant to Section 10.2(b) (Ex. FFFF). Mr. Fugazy informed Mr. Marx of this. (Ex. FFFF) It seems that plaintiffs did not attempt to raise any objection to this and in fact approved of it. (Ex. FFFF). As indicated in the registration statement (Ex. 30) the shares of eighteen shareholders other than the plaintiffs were included in the registration statement.

38. Defendants established that plaintiffs never performed their obligations to make advance payment of registration expenses and to deliver the indemnity agreement to Diners as they were required to do by Sections 10.2(b) and 10.2(c) of the agreement and as they agreed to do in requesting registration. (Ex. 27) Plaintiffs' obligations were conditions precedent to any obligation of Diners to use its best efforts under the express language of the agreement. (par. 28 above) An accord on August 27, 1969 wherein Diners agreed to accept new obligations in substitution for plaintiffs' obligations to make advance payment and deliver an indemnity (Ex. WWW, IIII) resolved the matter.

39. On July 15, Faunce wrote to plaintiffs advising them that Diners was "in process of preparing a registration statement" and reminding them that Section 10.2(b) of the agreement required plaintiffs to pay Diners in advance an amount sufficient to cover half the costs of the registration statement. (Ex. PPP) Faunce further advised plaintiffs that their share of the costs were estimated at $35,135 and stated the following:

> "Accordingly, before we proceed further with the registration, we would like to have your check made out to us in the amount of $35,135, representing one-half of the foregoing fees, costs and expenses, in accordance with the acquisition agreement. If the final fees, costs and expenses should turn out to be less than the above total, you will of course be reimbursed for one-half of the difference. On the other hand, if such fees, costs and expenses should turn out to be more than the above, you will be required to pay to us one-half of the excess." (emphasis added)

40. On August 15, Mr. Weber, Diners' counsel, repeated Mr. Faunce's demand for payment and advised plaintiffs that "Upon receipt of your check in that amount, the Company is prepared to proceed to file the registration statement" (Ex. QQQ). Plaintiffs did not respond to Mr.Weber, but instead wrote on August 21 to Mr. Bloomingdale stating "It does not seem feasible to pay to Diners in accordance with the aforementioned acquisition agreement 'in advance' an amount sufficient to reimburse Diners Club for one half of all registration fees . . ." (Ex. RRR) (emphasis added) Plaintiffs then proposed a modification of their obligations under the agreement to permit them to pay "after the registration statement is effective" within 30 days after receipt by plaintiffs of "itemized bills" approved by the parties. In addition, on August 21, counsel for DFT was speaking to Diners' counsel on behalf of plaintiffs to reduce the scope of the indemnity agreement which plaintiffs were required to deliver to Diners by Section 10.2(c) (Ex. SSS).

41. On August 22, Weber wrote to plaintiffs advising them that plaintiffs could not be given the right to approve the bills connected with the registration statement and further advising them that if plaintiffs refused to give Diners an indemnity, Diners would not provide plaintiffs with an indemnity under the agreement. (Ex. UUU, TTT) Marx responded on the same day, refusing to pay anything to Diners in connection with the registration statement unless Diners gave plaintiffs an indemnity, and concluded as follows:

"We are not authorizing you to file any registration on our part or for our benefit without proper indemnification." (Ex. VVV)

42. On August 26, 1969 plaintiffs received and signed the agreement to substitute a guarantee obligation in connection with the expenses of the registration statement for the obligation to make payment in advance of filing, which includes the following comments: (Ex. WWW)

"You are in the process of preparing for filing with the Securities and Exchange Commission, a Registration Statement on Form S-1. That Registration Statement relates in part to shares of your Common Stock, $1 par value, received by F T Ventures, Inc. in connection with the aforesaid acquisition.

Under the aforesaid acquisition agreement, F T Ventures, Inc. agreed to pay you, in advance, an amount sufficient to reimburse you for half of certain of the expenses to be incurred in connection with that Registration Statement.

You have agreed that F T Ventures, Inc. need not make that advance payment.

In consideration therefor, we each personally agree to guarantee the payment by F T Ventures, Inc. of one-quarter of all registration fees, printing costs, auditors fees (but only in excess of normal fees paid by you for your fiscal year end audit), legal fees and all other incidental out-of-pocket expenses incurred by you in connection with such Registration Statement; provided, however, that our guarantees as aforesaid shall be limited to the amount of $15,000 each and provided, further, that you will forward to us copies of all bills relating to such expenses for examination. These guarantees do not, of course, limit the liability of F T Ventures, Inc. to reimburse you to the extent of one half of such expenses." (emphasis added)

43. On August 27, 1969 the matter of the indemnity agreement was resolved. (Ex. IIII) The registration statement was filed on the following day, August 28, 1969. (Ex. 30)

44. Mr. Asch testified that prior to 1969 Diners had not filed a registration statement since 1955. (Tr. 1114) This was generally confirmed by Mr. Faunce. (Tr. 1699) The work on the registration statement therefore required "countless meetings" with lawyers and financial people, some of which were attended by Fugazy. (Tr. 1698, 1707-08) The registration statement covered a great many matters and required extensive activity. (Ex. 30; Tr. 1114-16) By August, a great many hours had been spent in preparing the registration statement by Diners' lawyers and accountants and Diners had already committed to spend in excess of $56,000 on it. (Ex. QQQ)

45. After the filing of the registration statement, the S.E.C. failed to furnish any comments to Diners until October 20, 1969. (Ex. 40) The S.E.C. textual comments contained in Exhibit 39 required revisions relating to 15 specific areas and several areas of general revisions. Diners' counsel promptly forwarded the S.E.C. comments to officials of Diners, including Fugazy. (Ex. 40) In addition, Diners obtained further information from plaintiffs required by the S.E.C. (Ex. KKKK, LLLL) On October 31, the S.E.C. orally communicated its accounting comments requiring Diners, inter alia, to update its financial statements. (Tr. 1119)

46. Diners prepared and delivered responses to the S.E.C. textual and accounting comments on November 5 and November 11 (Ex. NN, PP). During that same period, there were telephone discussions and meetings with the S.E.C. in Washington and generally extensive activity in response to the S.E.C. comments (Ex. NN, PP; Tr. 300-304), 310-17)

47. On November 18, 1969, plaintiffs agreed to withdraw their request that Diners register their shares in return for other consideration and Diners' agreement to file a registration statement as promptly as practicable after June 30, 1970. (Ex. MMMM) When Diners declined plaintiffs' proposal, plaintiffs made another proposal, which Diners also declined. (Tr. 875-76) Pursuant to plaintiffs' requests for alternate procedures in lieu of registration, Diners' counsel provided plaintiffs with an appropriate opinion concerning the potential sale of their shares. (Ex. 33) The tender offer by Continental on February 6, 1970 rendered the question of registration academic. (Ex. 26; Tr. 308)

48. The above evidence was received virtually without challenge by plaintiffs. The documentary exhibits were received without objection and little or no attempt was made by plaintiffs on cross examination to attack them in any way. Thus, the evidence presented by defendants as described above, stands essentially undisputed on this record.

49. At the close of defendants' case on May 23, it was

clear that the evidence overwhelmingly established that Diners had not breached the agreement and that plaintiffs had completely failed to meet their burden to prove that Diners had failed to use its best efforts to cause the filed registration statement to become effective. It is respectfully submitted that the state of the record at the close of defendants' case required a directed verdict in favor of defendants at that point. However, the Court, on May 19, had ruled that plaintiffs would be permitted to present a rebuttal witness so that defendants' motion had to await the presentation of "all the evidence" in accordance with the Court's prior statement. (Tr. 924)

Plaintiffs' Case
On Rebuttal

50. On May 15, after the commencement of defendants' case, plaintiffs first announced their intention to call an expert witness on rebuttal and, on May 19, received permission, over defendants' objection, to present the witness. The question of the presentation of the witness in that fashion is discussed more fully herein and in deponent's supplemental affidavit annexed hereto, and will not be referred to at length at this point.

51. The expert, Mr. Friedman, was not presented by plaintiffs as a proper rebuttal witness. He was not used to refute or explain any specific evidence adduced on defendants' case. Instead, Friedman testified as a direct witness on behalf of plaintiffs, whose obvious purpose was to deal with the entire

breadth of plaintiffs' claim-in-chief. Friedman's testimony was designed to try to cure the many defects in plaintiffs' claim and to try to create a plausible basis for plaintiffs' claim to be permitted to go to the jury. However,Friedman went even beyond that and created, out of whole cloth, a new claim for plaintiffs which had never previously been put forth by plaintiffs throughout five years of litigation of this action.

52. For the first time, on his "rebuttal" testimony (although the complaint was served in June, 1970, the pre-trial order was completed in December, 1974 and the action had been extensively litigated for five years), Friedman claimed on behalf of plaintiffs that the filing of the registration statement on August 28, 1969 by Diners was improper, and that Diners, by filing the registration statement on that date, had breached Section 10.2(b) by not promptly filing.

53. Although qualified only as an expert in "securities regulation" (Tr. 1726) and not in the interpretation of contracts, Friedman was permitted, over objection, to interpret the language of the agreement to support his new claim. Thus, Friedman was permitted to contend that the agreement required Diners to commence work on the registration statement <u>immediately</u> upon receipt of notification by plaintiffs. (Tr. 1731-33) This contention of Friedman directly contradicts the clear and unambiguous language of the agreement. (par. 26-29 above)

He further contended that plaintiffs' mere notification created an absolute obligation of Diners to move forward with the registration statement unless plaintiffs specifically withdrew their request. (Tr. 1771) That contention also conflicts with the express language of the agreement. (par. 26-29 above)

54. Based on that improper and erroneous premise, Friedman stated that Diners should have filed by June 20 based, in part, on an additional erroneous assumption that Diners was required by the S.E.C. to file its Form 10-K annual report by June 30, 1969. (Tr. 1733-35) Even though Friedman was shown his error and that Diners had until July 30, 1969 to file the 10-K (Ex. WWWW), Friedman still insisted Diners should have filed by June 20.

55. Friedman, although forced to concede that plaintiffs had not performed the conditions to make advance payments and to deliver an indemnity by late August (Tr. 1776, 1779-80), simply interpreted the agreement again to try to excuse plaintiffs' non-performance, and to insist that Diners was obliged to file by June 20 even though plaintiffs had failed to perform those conditions. (Tr. 1780-81) With respect to the condition of advance payment, Friedman even tried to read into the agreement some sort of right for plaintiffs to approve bills and approve amounts spent on the registration statement, and even to pay after the filing rather than <u>in advance</u>. (Tr. 1760-64, 1766)

56. When shown the correspondence demonstrating the activities clearly initiated by plaintiffs to avoid registration and the costs and effort attendant thereto, and to seek alternatives to registration (Ex. MMM, NNN, MMMM), Friedman interpreted the agreement to give plaintiffs the sole option to pursue such alternatives while keeping Diners' obligation to file and register absolute, notwithstanding such activities in search of an alternative. Friedman said these activities did not "suspend" the time in which Diners had to file upon receipt of plaintiffs' notification. (Tr. 1773-75) Then Friedman rendered his conclusion that none of these matters constituted a "legal excuse" for Diners' "failure" to file by June 20. (Tr. 1737-42)

57. In sum, Friedman concluded that under the agreement Diners had an absolute obligation to file the registration statement by June 20 under any and all circumstances. Such a conclusion is in direct conflict with the express language of the agreement (par. 26-29 above) and the undisputed evidence on this record demonstrating the contrary.

58. Having now heard from Mr. Friedman, for the first time in five years of litigation, that Diners was somehow absolutely obliged to file the registration statement by June 20, Diners was next informed by Mr. Friedman for the first time in five years of litigation, that the registration statement should have become effective by late August, 1969 or within 70 days after the June 20 filing date. Furthermore, Friedman concluded,

any failure of the registration statement to become effective within that period, regardless of any of the existing facts or circumstances, conclusively demonstrated that Diners had failed to use its best efforts.

59. At one point Friedman simply concluded that Diners had failed to use its best efforts simply because the registration statement did not become effective. (Tr. 1746-47)

60. Plaintiffs' counsel advised Friedman that the Court had taken judicial notice of the S.E.C."70-day" figure and gave him Exhibit 54 for identification on the stand. It was obvious that Friedman had never seen the report before and had no knowledge concerning its preparation. Yet, Friedman was permitted to read the report and to testify, over objection, that the report showed that the registration statement in this case should have become effective within 70 days. Friedman's first statement of this conclusion was based on his erroneous premise that the 70-day figure was an "average". When informed later on cross examination that the figure was merely a "median", his answer remained the same (Tr. 1792), despite conceding that "median" implies that some could take five days and some could take five months. (Tr. 1792)

61. Thus, Friedman contended, the registration statement should have become effective within 70 days after filing, regardless of any circumstances. Even though he conceded at another point on cross examination that he knows of registration

statements which required four months to become effective. (Tr. 1792) Even the fact that the S.E.C. did not issue accounting comments until 63 days after the filing date, did not change his contention. (Ex. 39, 40, NN, PP)

62. Although Friedman admitted that he had never spoken to the plaintiffs and had no knowledge of the facts other than the inferences he drew from documents and conversations with counsel (Tr. 1759-60, 1766-66a), he testified that nothing would change his contention that Diners should have filed the registration statement by June 20 and that it should have become effective by late August, 1969.

The Motions For
Directed Verdict
At the Close of
All the Evidence

63. At the conclusion of Friedman's testimony on May 23, defendants moved for a directed verdict on plaintiffs' 1968 fraud claim, plaintiffs' contract claim and the counterclaims and plaintiffs moved against the counterclaims. Both motions were denied. It was apparent that the only basis for the Court's denial of defendants' motion with respect to the contract claim was the Court's belief that Friedman's testimony had created sufficient inferences to permit plaintiffs' contract claim to go to the jury.

DINERS IS ENTITLED TO JUDGMENT IN ITS FAVOR ON PLAINTIFFS' CONTRACT CLAIM NOTWITHSTANDING THE VERDICT AWARDING PLAINTIFFS DAMAGES ON THAT CLAIM

64. The verdict necessarily included findings that Diners should have filed the registration statement by June 20 and that it should have become effective by late August, 1969. Because these events did not occur in accordance with that schedule, the jury concluded that Diners had breached the agreement and awarded plaintiffs damages measured by the closing price of Diners stock in late August, 1969. (Ex. 48) The facts and authorities cited herein and in the accompanying memorandum clearly demonstrate that that portion of the verdict cannot be sustained and should be set aside.

65. In presenting their case, plaintiffs produced no shred of evidence to suggest that Diners failed to use its best efforts to cause the registration statement to become effective. Nor did plaintiffs produce any evidence at all to suggest when, if ever, Diners' obligation came into existence. (par. 13-25) Absolutely no evidence was presented, nor was it even alleged, that the filing of the registration statement on August 28 was not prompt or that it should have been filed on any prior date. (par. 11, 25 above) Since plaintiffs' evidence was so necessarily deficient to prove any breach by Diners of the agreement or to establish the elements of any claim for breach of contract, defendants' directed verdict motion should have been granted on May 14.

66. On May 14, plaintiffs had closed their case and to all intents and purposes had no intention of producing any rebuttal evidence. Their claim had to be judged on the state of the record as it stood on May 14. In any event, no proper rebuttal evidence could possibly cure such basic and numerous defects in the proof of all the essential elements of their claim. To the extent a witness on rebuttal could achieve that, he would not be a proper rebuttal witness, a subject discussed more fully below. In any event, even assuming that all of Mr. Friedman's testimony was proper rebuttal and admissible, his testimony did not really change the state of the record on these crucial issues. Although Friedman obviously swayed the jury in plaintiffs' favor by his repeated assertions that Diners breached the agreement, it is apparent that even Mr. Friedman's zeal could not create a valid contract claim from whole cloth in violation of basic principles of contract law.

67. As set forth at page 3 of defendants' memorandum, plaintiffs, to be entitled to recover on their contract claim, were required to prove their performance of all conditions precedent to Diners' obligation and Diners' subsequent breach of the agreement. Plaintiffs have completely failed to meet their burden of proof.

68. The evidence clearly establishes that plaintiffs were required to make advance payment to Diners and deliver to Diners an indemnity as conditions precedent to any obligations of Diners. (par. 28, 29, 14, 38, 39, 42 above) The law is well

settled that Diners' obligation did not arise until the performance of these conditions. (Deft. Br., p. 10) Friedman's attempts to interpret the unambiguous language of the agreement or otherwise excuse plaintiffs' non-performance is without any probative value. In addition, Friedman's attempts conflict with the express language of the agreement and the admissions of plaintiffs that they were so obligated. (par. 14, 42 above)

69. The evidence further shows that the parties did not enter the accord concerning the conditions until August 27. (par. 42, 43 above) Thus, the filing on August 28, one day after the obligation arose, must be deemed prompt in accordance with the agreement as a matter of law.

70. In addition, plaintiffs produced no evidence to suggest that the alternative activities required by the agreement to secure a no-action letter from the S.E.C., another indispensable predicate to the existence of Diners' obligation (par. 26, 29 above), were resolved in such a way as to suggest that the August 28 filing and subsequent events constituted any breach of the agreement by Diners. In fact, the evidence conclusively establishes that these activities continued, primarily at plaintiffs' instigation from April through November, 1969 and thereafter, in varying degrees of intensity. (par. 33- 36, 47) The express language of the agreement and plaintiffs' conduct established by the evidence render meaningless Friedman's unsupported conclusion that Diners' obligation arose immediately upon plaintiffs' notification and was absolute. Here, as in

other instances, Friedman's zeal exceeds that of plaintiffs themselves since they do not so contend and even admit the contrary. The evidence demonstrates, in light of these activities, the August 28 filing was not a breach of the agreement. This is especially apparent since Diners (with plaintiffs' knowledge) authorized other shares to be included in the registration statement in late July as permitted by the agreement. (par. 27, 37 above).

71. There is absolutely no evidence to support a claim that Diners failed to use best efforts. The only evidence on the question demonstrates plaintiffs' failure to establish that claim. (par. 20-22, 44-47 above)

72. The only "evidence" offered by plaintiffs to even suggest Diners' failure to use best efforts was Friedman's distortion of the S.E.C. 70-day median figure. A median figure is singularly irrelevant to the time required for any particular registration statement in its particular circumstances. Since Friedman concedes he had no knowledge of Diners' activities after the filing of the registration, his testimony, based solely on that median data, was incompetent as a matter of law to show that in this particular situation, Diners failed to use its best efforts.

73. In awarding damages to plaintiffs on this claim on the state of this record, the jury was clearly required to make erroneous determinations on questions of law. In determining that the registration statement should have been filed prior to

the performance of the conditions precedent by plaintiffs, or before the accord of August 27, the jury had to disregard the existence of the conditions or excuse their non-performance. Since there is no dispute on this record concerning the existence or the non-performance of these conditions, the verdict has no basis in fact and erroneously determines the applicable law. (Deft. Br., pp. 9-13) The consequences of the admitted failure to perform conditions precedent is purely a question of law and not within the jury's province. Since the jury obviously determined that Diners' obligation to file (June 20) arose prior to the performance of the conditions by plaintiffs, it must be set aside.

74. Similarly, in determining that Diners' obligation commenced on plaintiffs' notification and required Diners to file by June 20, the jury has accepted Friedman's unsupported conclusion to that effect in violation of the express language of the agreement (par. 26, 29 above) and the undisputed conduct of the parties (par. 26, 33-36 above). The record is clear that the parties had not even completed these alternative activities by June 20, the date Friedman selects for the filing. Thus, the jury disregarded the specific and unambiguous language of the contract in violation of basic principles of contract law.

75. The consequences of the accord are purely questions of law and are also outside the jury's province. (par. 40-43 above) When the parties entered into the accord to

substitute new obligations for the obligations existing under Sections 10.2(b) and 10.2(c) they thereby gave up all causes of action based on the original obligation. (Deft. Br., p. 14) In determining that plaintiffs can now recover under the purported former obligation (i.e. to file by June 20), the jury determined the legal consequences of the accord and that determination was both outside their province and erroneous.

76. The only "evidence" on this record which could be cited to sustain the verdict that Diners failed to promptly file and to use best efforts is the unsupported, conjectural conclusion of Friedman that the registration should have been filed by June 20 and should have become effective by late August. His conclusion is based on improper misinterpretations and nullification of the clear language of the agreement and reliance on the irrelevant and misleading S.E.C. median figure data and complete lack of knowledge of the facts and circumstances of the case. As such, his testimony is incompetent as a matter of law and constitutes no evidence at all. The overwhelming evidence presented by Diners establishing the absence of any breach of the agreement by Diners, as set forth at length above (par. 20-49 above) mandates that the verdict be set aside.

DINERS SHOULD BE
GRANTED A NEW TRIAL
ON THE CONTRACT CLAIM

77. The Court clearly has the power to grant a new trial pursuant to Rules 50(b) and 59 on the ground that the verdict is against the weight of the evidence. It is respectfully submitted that the instant case is singularly appropriate for the granting of such relief. The evidence has already been discussed at length (par. 13-49 above; Deft. Br. p. 18 et seq.) and deponent will not burden the Court with unnecessary repetition herein. It seems that the evidence is so overwhelmingly in favor of defendants on the contract claim that the verdict should be set aside. In any event, the authorities cited in defendants' memorandum clearly illustrate that this situation requires at least the granting of a new trial for defendants since the verdict is at least against the weight of the evidence on this record.

78. In addition, there were several prejudicial errors which require a new trial, principally centering on the permitting of Friedman to testify as a surprise rebuttal witness. As discussed below, the surprise surrounding Friedman's appearance virtually constituted an improper "ambush" of defendants. In addition, Friedman was not a proper rebuttal witness since, on "rebuttal", he actually gave birth to an entirely new claim which now forms an indispensable part of the jury's verdict and otherwise testified as a direct rather than a rebuttal witness. He also testified improperly to

misinterpret the agreement and the S.E.C. report. These factors dictate the need for a new trial as set forth below.

79. Although the pre-trial order had been completed in December, 1974 and notice of the May 6 trial date was given by the Court in early April, 1975, plaintiffs had not listed any expert in their pre-trial order nor identified any proposed expert when the trial commenced. When plaintiffs' case closed on May 14, no such mention had been made. Accordingly, defendants had not planned to call an expert to testify on their behalf.

80. On May 15 after defendants' third witness had concluded testifying for the day, plaintiffs' counsel indicated he might call an expert on rebuttal. Deponent objected and the Court reserved decision, directing plaintiffs, in any case, to identify the proposed witness. Late in the afternoon of Friday, May 16, deponent's firm received a letter identifying the proposed witness. (Supplemental Aff., Ex. A)

81. The matter of whether the witness was to be permitted to testify was not resolved until May 19. Deponent objected to the presentation of the witness, inter alia, on grounds of surprise and that he was not a proper rebuttal witness. On previous occasions, the Court had excluded documents which had not been listed in the pre-trial order. The Court also commented that he probably was not a proper rebuttal witness and should have been called on plaintiffs' case-in-

chief. However, the Court overruled the objection and permitted the witness to testify. Only at that point was it established that Friedman would testify at all.

82. On May 19, defendants were faced with the need to conclude their case as the Court had indicated that all testimony would be concluded by May 22 or May 23. Trial days were scheduled for May 21, 22 and 23, if necessary. Defendants were in the midst of preparing and presenting their case in defense of plaintiffs' 1968 fraud claim, the 1969 contract claim and on the counterclaims, which involved the testimony of the witnesses Johnson, Herd, Phillips, Marx, Fugazy, Flug, Asch and Faunce, the introduction of numerous documentary exhibits, the preparation of legal briefs, requests for charges, the closing statement to the jury, and a variety of other activities to conclude the trial by May 22 or 23. Consequently, defendants had absolutely no time or opportunity in the following three days to investigate Friedman's background, prepare for his testimony or to engage and prepare an expert for defendants.

83. When Friedman testified in the afternoon of May 23, the last day for testimony, he raised the "prompt filing" claim for the first time after five years of litigation and three weeks of trial. In addition, he revealed that he had agreed to testify three weeks before, prior to the commencement of trial, and had been examining documents in the case prior to the close of plaintiffs' case. (Tr. 1754-56) There was no reason for plaintiffs not to disclose their intention to present Friedman

at the start of the trial, after they had already engaged him, or prior to the close of plaintiffs' case, while he was already examining documents, except to maximize the surprise and prejudice to defendants and secure for themselves an unfair tactical advantage.

84. Friedman testified he had testified about "similar" contract language in a prior litigation. (Tr. 1797) He also revealed on cross examination that plaintiffs' counsel had examined the transcript of his prior testimony and had discussed it with him. (Tr. 1754-56) Yet, plaintiffs' counsel had not furnished defendants with a copy and had not even disclosed its existence. Thus, defendants were completely and unfairly precluded from cross-examining Friedman on his prior testimony at this trial. This was crucial since defendants, as discussed in the accompanying memorandum, later independently obtained the opinion which shows that Friedman's prior testimony contradicts the sworn testimony he gave on "best efforts" in this case. (See accompanying memorandum)

85. Plaintiffs further frustrated proper cross-examination by at first denying the existence of any published articles by the witness. When deponent's firm independently learned of such publications, plaintiffs finally produced them, but not until 6:00 p.m. on May 22, the evening before Friedman was to testify.

86. During the evening of May 22, deponent was required to prepare for the testimony of Flug, Faunce and Asch, the presentation of documentary evidence, the preparation of requests to charge and the summation to the jury which was scheduled to take place the following day, as well as the testimony of Friedman. It was impossible to examine the Friedman article just received or otherwise prepare adequately for his testimony that evening.

87. When Friedman testified on May 23, it was thus impossible for defendants to properly cross-examine him. Moreover, the unwarranted surprise involved in such testimony was totally unjustified. It arose from plaintiffs' willful non-disclosure of the presentation of Friedman until the last minute, although he had been engaged three weeks before, and the other non-disclosures mentioned above. The Court may well wonder, as does deponent, why plaintiffs did not at least disclose on May 6 that they had engaged Friedman and might call him as a witness.

88. Friedman's testimony should also have been excluded as improper rebuttal. The authorities in the accompanying memorandum involve many similar instances where a new trial was granted on that basis. Friedman was not produced to rebut an expert called by defendants, nor was he called to rebut any new facts adduced by defendants previously unknown to plaintiffs. Defendants' evidence comprised documentary evidence previously produced to plaintiffs and the testimony of Messrs. Faunce and

Asch, both deposed by plaintiffs in this case. Thus, Friedman was used solely to try to establish all elements of plaintiffs' contract claim - testimony which should properly have been elicited during the case-in-chief - and, most important, to create a new claim - the prompt filing theory.

89. The conclusion is inescapable that plaintiffs maneuvered to present Friedman on rebuttal to secure a tactical advantage, perhaps to have an unwarranted impact on the jury. It is respectfully submitted that if Friedman, who was not listed in the pre-trial order and whose testimony was not designed to rebut defendants' evidence, should have been permitted to testify at all, it should only have been on the case-in-chief and not on rebuttal.

90. Whether Friedman was presented in that fashion to achieve unfair surprise to prejudice defendants, or to achieve the tactical advantage of "the last word" for plaintiffs is meaningless. In either event, the authorities cited in defendants' memorandum demonstrate clearly that Friedman should not have been permitted to testify on rebuttal under these circumstances, and his testimony should have been completely excluded.

91. The authorities in defendants' memorandum show that, especially with respect to experts, the adverse party is to be given every opportunity to receive advance information about the proposed testimony, the expert's published articles and the like, to insure the opportunity for full and proper

cross examination. It is difficult to conceive of a situation where those principles were flouted more than in this situation. On the last day of trial, Friedman pulled out his "prompt filing by June 20" theory like a rabbit from a hat. Plaintiffs had never before made that claim. Fugazy and Marx had not testified about it and they had already left the stand. Defendants had not been given Friedman's article until too late and learned of his prior testimony only in the courtroom that last day. It would have been completely enlightening for the jury to have learned that Friedman had testified in the prior case that a registration statement might not become effective despite the best efforts of the company and its counsel.

92. The prejudice to defendants from the above cannot be overstated. Without Friedman, plaintiffs had no evidence at all to support their claim and not even a mention of the prompt filing claim, and the Court had indicated it would consider granting defendants' motion at the close of all the evidence. (Tr. 910) Without Friedman's testimony the contract claim would not have gone to the jury.

93. In addition, Friedman's testimony constituted plaintiffs' sole "evidence" in support of their claim that Diners had failed to promptly file and to use best efforts. Without Friedman, there was no possible evidence to suggest that the S-1 should have been filed by June 20 (or any date) and should have become effective by late August (or any date).

Thus, the late August date which is the measure of the damages awarded to plaintiffs could not have been determined by the jury without Friedman's testimony. In that event, even if the jury still believed that plaintiffs were somehow entitled to damages they would have had to decide on a date by themselves. It is respectfully submitted that without Friedman's "help", it was impossible for the jury to select late August or any earlier date.

94. It is also respectfully submitted that, even if Friedman had been permitted to testify, he should not have been permitted to interpret the express language of the contract and offer conclusions of law relating thereto. Friedman, even as a purported expert in securities regulation, was not qualified to interpret clear and unambiguous contract language. For example, a great deal of Friedman's testimony is premised on his contention that Diners' obligation arose immediately upon plaintiffs' request and was an absolute obligation until specifically withdrawn by plaintiffs. That testimony was an indispensable part of his conclusion, which the jury accepted, that the registration statement should have been filed on June 20. Friedman's interpretation of the agreement was improper and is refuted by the express language of the agreement. (par. 26, 29 above) Friedman also interpreted the contract to give the option to pursue a "no-action" letter solely to plaintiffs, which the jury apparently accepted. This is also precluded by the express language of the agreement. (par. 26, 29 above)

95. Friedman also misinterpreted the contract to give plaintiffs some sort of right to approve the bills for registration expenses. He then testified to the ultimate conclusion of law that notwithstanding plaintiffs' failure to perform the conditions and plaintiffs' pursuit of alternatives to registration, the agreement obliged Diners to file before August 28. It is respectfully submitted that without such improper testimony the jury would have been required to conclude that the August 28 filing was prompt in the circumstances of this case.

96. It is respectfully submitted that Friedman should not have been permitted to read and distort the S.E.C. bulletin (Ex. 54) The document speaks of "median" dates which means that half of the registration statements took longer than 70 days and half took less. Friedman distorted that data into an absolute requirement that the registration statement in this case should have become effective 70 days after filing. Without that testimony, the jury could not have used late August as a measure of plaintiffs' damages.

97. It is respectfully submitted that the Court should not have taken judicial notice of the 70-day median figure. "Median" time periods are totally irrelevant to the length of time required for an individual registration statement or to the time required to process the statement filed by Diners in the circumstances of this case. The document also covered time periods subsequent to the August 28 filing date. Any conceivable relevance was completely outweighed by the prejudicial quality of a government document which "seems" to indicate that every registration statement should have become effective within 70 days.

When combined with Friedman's distortion of the meaning of the data, the prejudicial effect was overwhelming.

98. It is respectfully submitted that the Court should direct plaintiffs to remit the damages they received as measured by the closing price of Diners' stock in "late August", 1969 as discussed in defendants' memorandum.

DEFENDANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND A NEW TRIAL SHOULD BE GRANTED

99. Defendants Diners and DFT had pleaded and presented evidence at the trial on three counterclaims against the plaintiffs: first, a 10-5 fraud counterclaim on the grounds that plaintiffs had made misstatements of material facts and omitted to state material facts in connection with the sale of Fugazy Travel Bureau to Diners; secondly, that the plaintiffs breached certain provisions of the purchase agreement and documents submitted therewith; and thirdly, that plaintiffs breached fiduciary duties which they owed to Diners and DFT as officers and directors of those companies. The jury found for the plaintiffs on those claims. Said defendants moved at the close of all the evidence for a directed verdict on those claims, which was denied by the Court. Said defendants moved orally after the jury's verdict for judgment n.o.v. and for a new trial in the alternative on those claims. The Court reserved decision, pending the submission of these papers.

100. The instant motion is submitted in support of a motion for judgment n.o.v. and a new trial in the alternative on the basis that the uncontroverted evidence established that plaintiffs had retained an interest in the branch travel office at 342 Madison Avenue* after the purchase of Fugazy Travel Bureau by

*This office had purportedly been sold to a company known as Travelco, Inc. (N.Y.), purportedly owned by one Irwin Fruchtman in June 1967 for $250,000.

Diners, in violation of the purchase agreement and related documents and in violation of plaintiffs' fiduciary duties to Diners and Diners World Travel and that plaintiffs not only did not disclose these material facts but they actively concealed them from defendants. Plaintiffs were compelled pursuant to the provisions of those documents to divest themselves of all interest, direct or indirect, in that office, in order to avoid a clear conflict of interest in their positions as officers and directors of Diners and DFT. It is respectfully submitted that the jury's verdict implicitly finding no violation by plaintiffs of either of those agreements or of their fiduciary duties and no 10-b(5) fraud was without the support of any evidence, that the jury's verdict was an erroneous determination of a question of law, and that the evidence on said issue was overwhelmingly in favor of the defendants. Said defendants' motion for a directed verdict on those claims should therefore have been granted, and defendants now request that judgment n.o.v. be entered on their behalf and a hearing date set for an assessment of damages, and that a new trial on those claims be ordered in the alternative.

101. The Court had charged the jury on this issue:

> "If you find that the plaintiffs maintained a direct or indirect interest in the franchise office at 342 Madison Avenue during the time that they were officers and/or directors of Diners, or any of its subsidiaries..., you may return a verdict for the defendants against the plaintiff who you find to have breached his fiduciary duties on this claim." (Tr. 1973).

102. It is respectfully submitted that on the basis of the testimony and documents introduced at the trial that

the jury's finding to the contrary on this issue was without any foundation. Paragraphs 103-105 below set forth the specific agreements that were violated by plaintiffs Marx, William and Louis Fugazy.

103. The purchase agreement dated October 10, 1967 (Pl. Ex. 5) provided, inter alia:

> "2.21 Disclosure. No representation or warranty by Fugazy in this agreement or in any schedule or certificate or other document furnished or to be furnished to Diners pursuant hereto, or in connection with the transactions contemplated hereby, contains or will contain any untrue statement of a material fact, or omits or will omit to state a material fact required to be stated therein or necessary to make the statements contained therein not misleading or necessary in order to provide a prospective purchase of the business of Fugazy and its subsidiaries with proper information as to the business and affairs of Fugazy and its subsidiaries." (page 23)
>
> * * * * *
>
> "4.6 Interest of Certain Individuals in Travelco Corporations. Otto Marx, Jr., William D. Fugazy and Louis V. Fugazy (hereinafter referred to as the 'principal officers') shall, at or prior to the time of the closing, have divested themselves of, and shall have caused all members of their respective families to divest themselves of, any interest in any of the foregoing they have had, directly or indirectly, in any franchise, in Travelco, Inc. (Pa.) and in Travelco, Inc. (N.Y.) [the latter being the office at 342 Madison Avenue]." (pages 26-26A)
>
> * * * * *
>
> "9 Conditions to Obligations of Diners. Unless the following conditions are satisfied at the time of the closing, Diners shall, in its discretion, not be obligated to consummate the transactions contemplated herein:
>
> * * *

"9.15 Interests in Travelco Corporations. Affidavits of the principal officers, in form and substance satisfactory to counsel for Diners, to the effect that they and members of their respective families shall have divested themselves of any interest, direct or indirect, that they may have had in any franchise, in Travelco, Inc. (Pa.) and in Travelco, Inc. (N.Y.), shall have been delivered to Diners." (pages 30, 36)

* * * * *

"11.1 Survival of Representations, Warranties and Covenants. In addition to the representations and warranties of Fugazy contained in this agreement, all statements contained in any schedule, certificate, opinion or other document delivered by or on behalf of Fugazy pursuant hereto or in connection with the transactions contemplated hereby shall be deemed representations and warranties by Fugazy herein. All such representations, warranties and covenants shall survive the time of the closing and any investigation made by or in behalf of Diners." (page 40) (emphasis added).

104. Each of the employment agreements simultaneously entered into between DFT and plaintiffs William and Louis Fugazy and Otto Marx, Jr. as of October 10, 1967 provided:

"6.(a) In consideration of the execution by DFT of this employment agreement, the employee agrees that for the period set forth in paragraph (b) below he will not, in any manner, directly or indirectly, engage in the business of providing travel or related services or licensing or franchising others to provide such services or in any business which competes with any of the fields in which Fugazy is presently engaged and he will not directly or indirectly own, manage, operate, join, control or participate in the ownership, management, operation or control of or be employed by or connected in any manner with, any corporation, firm or business that is so engaged without DFT's prior written consent. For the purposes of the foregoing, Travelco, Inc. (Pa.) and Travelco, Inc. (N.Y.) shall be deemed engaged in the travel business.

(b) The period of non-competition referred to in this section 6 shall commence on the effective date and shall terminate (i) in the event this agreement is terminated under section 4(a), one year after such termination and (ii) in the event employee's employment as a full time employee is terminated under section 4(b), one year after such termination if DFT elects not to employ employee as a consultant as hereinafter provided; and otherwise upon the expiration of the consultative period, as hereinafter defined." (Plaintiffs' exhibits 7, 34, 36, pages 7-7A) (emphasis added).

105. As provided in paragraph 9.15 of the purchase agreement, plaintiffs Marx, William and Louis Fugazy signed a joint affidavit on October 30, 1967, reading as follows:

"Otto Marx, Jr., William D. Fugazy and Louis V. Fugazy, being duly and severally sworn, each for himself, deposes and says:

That he and all members of his family have divested themselves of any interest, direct or indirect, that he or they may have had in any franchise, as that term is defined in the purchase agreement dated October 10, 1967, between The Diners' Club, Inc. and Fugazy Travel Bureau, Inc., in Travelco, Inc. a Pennsylvania corporation, and in Travelco, Inc., a New York corporation." (Defendants' Exhibit EEE) (emphasis added).

106. The evidence introduced at the trial demonstrated conclusively that the foregoing provisions had been violated by plaintiffs Marx, William and Louis Fugazy, in that, at a very minimum, said plaintiffs were under an obligation to indemnify Mr. Fruchtman in the event he did not recoup his "purchase price" (which was derived from a loan by Mr. Fruchtman from the Franklin National Bank in the amount of $99,000) out of the profits of the operation of the 342 Madison office, which indemnity survived the sale of Fugazy Travel Bureau to Diners.

Moreover, there was an admission by William Fugazy that once Mr. Fruchtman recouped his purchase price, the Fugazy brothers would automatically become 60% owners of Travelco, Inc. Clearly such an indemnity arrangement and contingent ownership interest constituted a violation of the provisions of the purchase agreement and related documents quoted in paragraphs 103-105 above. Such violations were material as a matter of law, inasmuch as these interests in Travelco were considered serious enough for elaborate treatment in connection with the sale to Diners, and allowed Diners to cancel the deal if the divestiture were not made (Pl. Ex. 5, ¶9, 9.15, pp. 30,36).

107. Defendants' exhibit FFF establishes that as of August 1, 1967, William and Louis Fugazy and Irwin Fruchtman were "holders of all of the outstanding shares of stock of Travelco, Inc., a New York corporation" and that "neither William, Fruchtman nor Louis shall sell, assign, transfer, encumber or in any way dispose of, except by the instrument admitted to probate as their last will and testament, any portion of their respective stock holdings in the corporation, without the written consent of the other stockholders....provided however, that as of such time as a certain loan in the amount of $99,000 from the Franklin National Bank to the corporation has been fully repaid, the stockholders will vote their shares for a board of directors consisting of William D. Fugazy, Louis Fugazy and Irwin Fruchtman, a nominee of

William D. Fugazy and a nominee of Irwin Fruchtman. 3. The corporation has borrowed the sum of $99,000 from the Franklin National Bank on July 18, 1967 and Irwin Fruchtman has guaranteed payment of the corporation obligations pursuant to such loan, to the Franklin National Bank. William and Louis hereby agree to indemnify and hold Fruchtman harmless against any and all losses arising out of his guarantee to the Franklin National Bank of the corporation's loan."

108. Defendants' exhibit GGG is an agreement dated October 13, 1967 among Marx, Summerlin and the Fugazys, providing for the liquidiation of Fugazy Travel Bureau by October 13, 1968, wherein said plaintiffs agreed that all the assets and liabilities of Fugazy Travel Bureau would be shared among them on the basis of 25 percent for each of the Fugazys, 40 percent for Marx and 10 percent for Summerlin. On page 5 of that exhibit, all the plaintiffs agreed to share in the same proportions the responsibilities for indemnifying Mr. Fruchtman "against any loss he may sustain by virtue of his investment of $100,000 in Travelco, Inc., a New York corporation":

> "In connection with the agreement between both of you and Irwin Fruchtman, pursuant to which you agreed to indemnify Mr. Fruchtman against any loss he may sustain by virtue of his investment of $100,000 in Travelco, Inc., a New York corporation, which is a party to a franchise agreement with the corporation for the New York City area, it is understood that the corporation will indemnify you in the event you are required to make any payment

to Mr. Fruchtman pursuant to your agreement with him. Accordingly, if Mr. Fruchtman has not received payment in full of such $100,000 from Travelco, Inc. prior to the liquidation of the corporation [by October 13, 1968], Marx & Co., Inc. and John V. Summerlin will place $50,000 in cash or its equivalent in a separate escrow at the time of such liquidation to secure their assumed share of the corporation's contingent indemnity liability to you, or will supply you with their personal guarantee. Such escrow shall terminate if and when Mr. Fruchtman received payment in full from Travelco, Inc., or at such other time as you, Marx & Co., Inc. and John V. Summerlin shall mutually agree, and at such time any remaining amounts of such $50,000 if deposited and held by the escrow agent shall be released to Marx & Co., Inc. and John V. Summerlin." (emphasis added)

109. The testimony of Messrs. Marx and William Fugazy at the trial demonstrates clearly that the agreements and warranties set forth in paragraphs 103-105 above were violated by the plaintiffs, in breach of the agreements with Diners and in violation of the fiduciary duties owed to Diners and Diners World Travel by William Fugazy and Otto Marx. On page 1460 of the trial transcript, the following colloquy appears with Mr. Marx:

"Q Did anybody at Diners' Club tell you they wanted to make certain you and the Messrs. Fugazy had no interest in the Travelco office?

A Yes. I did hear that.

Q Did they tell you what the reason was?

A Yes, they did.

Q What was the reason given to you?

A Mr. Bloomingdale told me that he felt--and I agreed with it--that there should be no conflicts of interest and that Diners Club should own the entire Fugazy Travel complex."

Then on page 1461:

"Q On October 30, 1967, did you have any direct or indirect interest in the office of Travelco, New York?

A I didn't think I had but this document makes me wonder."

Further on pages 1466-1467:

"Q Did you have a discussion with Mr. Fugazy about his and his brother's indemnity agreement with Mr. Fruchtman concerning Travelco?

A Yes.

Q Do you recall when that was?

A Slightly before the agreements were signed.

Q Which agreements?

A The agreements for the option period.

Q You are talking about the June agreements.

A Yes.

Q And Mr. Fugazy, did he tell you why he was indemnifying Mr. Fruchtman?

A Yes.

Q Why was that?

A Because Mr. Fruchtman requested it.

Q Did he tell you why Mr. Fruchtman requested it?

A Because Mr. Fruchtman felt that he knew very little about the travel business and he was buying into a business he knew nothing about, and that the Fugazys knew all about, so he requested he have some indemnification.

Q At all the times you were at Fugazy Travel had Fugazy Travel ever indemnified a purchaser of a Fugazy office before this occasion?

A Not that I can recollect."

Then on page 1468, Mr. Marx testifies as follows:

"Q Mr. Marx, do you recall having any discussion with Mr. Fugazy about your indemnifying him for some indemnity he might have to give Mr. Fruchtman?

A Yes.

Q Do you recall when that was that he first discussed it with you?

A I don't recall it, but I presume it was around the time this was signed.

Q Why did you give such an indemnity?

* * *

A I gave the indemnity because I felt if the Fugazys were indemnifying him we should share half the responsibility."

Then on pages 1469-1472, the following colloquy with Mr. Marx appears:

"[By the Court] Would you describe what was to happen in the event that the Fugazys did, in fact, indemnify Mr. Fruchtman?

The Witness: As I read this, Your Honor, Mr. Fruchtman did not receive payment in full of the $100,000 from Travelco prior to the liquidation of the corporation.

* * *

A In other words, if Mr. Fruchtman lost money and he did not get paid by Travelco, he would get paid 50 percent by the Fugazys and 50 percent by Marx & Co. and John V. Summerlin.

* * *

Q Did you disclose this indemnification agreement to Diners Club in 1967, Mr. Marx?

A I don't recall discussing it with them.

* * *

[By the Court] In the event that Mr. Fruchtman sustained the loss up to $100,000, was he to be indemnified?

The Witness: Yes, sir.

The Court: Will you describe the manner in which he was to be indemnified and by whom?

The Witness: He would be indemnified for the entire $100,000 if the company, Travelco, had lost that much money, and 50 percent of this, or $50,000, would be put up by William and Louis Fugazy, half each, 40 percent would be put up by Marx & Company and 10 percent by John V. Summerlin.

* * *

Q Do you know why the indemnity was not included in the June 19th agreement?

A No I don't."

110. Mr. Marx thus admits that the divestiture of 342 Madison was specifically requested by Diners for reasons of conflict of interest, that both he and the Fugazys nevertheless

had indemnified Mr. Fruchtman against losses he might sustain in the operation of the 342 Madison office, and that this indemnity arrangement was not disclosed to Diners.

111. Mr. Fugazy bolsters these admissions. On page 1519, the following testimony is given by Mr. William Fugazy:

> "Q Mr. Fugazy, I put before you defendants' exhibit FFF. I ask you to look at the signature page, please, and tell me if that is your signature.
> A It would appear so, yes.
> Q Is it your recollection that on or about August 1, 1967, you were a shareholder in Travelco?
> A August 1? I would say so, yes sir."

On page 1520:

> "Q Is it your recollection that the owners of the shares of Travelco were William Fugazy, Louis Fugazy and Irwin Fruchtman?
> A When?
> Q August 1, 1967.
> A Correct."

Then on page 1521, Mr. Fugazy admits that Travelco New York refers to the branch office at 342 Madison Avenue:

> "Q The reference to Travelco, Inc. a New York corporation, is that the corporation that owned the office at 342 Madison Avenue?
> A That is correct.
>
> * * *
>
> Q By the way, Mr. Fugazy, was the office at 342 Madison Avenue at 43rd Street?
> A Yes."

On pages 1527 and 1528:

> "Q Isn't it a fact that if the 342 Madison office lost money you were going to have to make it up in an indemnity and repayment of money to Mr. Fruchtman?
>
> * * *

A I think the answer is no. I merely had to guarantee Fruchtman, as I recall it, if Travelco was not able to pay over the loan to the bank, and that was paid over very shortly. I think they paid the loan off to the bank in six or seven months."

112. While contradicting Mr. Marx as to the purpose of the indemnity, Mr. Fugazy nevertheless admits that the indemnity at least carried past the sale of Fugazy Travel Bureau to Diners by several months, in clear violation of the agreements with Diners and the affidavits submitted to Diners on October 30, 1967.

113. Then on pages 1528-1530, William Fugazy admits that the interest of himself and his brother Louis was even greater than that of an indemnity:

"Q Was there any period of time, Mr. Fugazy, when you were liable on your indemnity to Mr. Fruchtman for losses suffered at 342?

A No, never.

The Court: What about this period?

The Witness: Your Honor, the indemnity was not against losses. The indemnity was Fruchtman borrowed $75,000 from the bank, and my brother and I guaranteed him if he had to make good on this loan we would make good, and that after the Franklin Bank was paid off we would get 60 percent of the stock and he would get 40. It doesn't have anything to do with losses at all. That is why when this conversation was going this morning I did not understand it.

Q Do you know how the loan was paid back?

A By Travelco.

Q Where did Travelco get the money?

A By making profits.

Q Profits from the business at 342?

A That is the business they were in.

* * *

Q You mentioned a moment ago that after payment to Fruchtman you would wind up owning 60 percent of the stock?

A Something like that, 59--control. I have not seen the papers.

Q That was the stock of Travelco?

A Yes. I don't know if it was 60."

114. Mr. Fugazy thus admits that not only did the period of indemnity carry through until after the sale of Fugazy Travel Bureau to Diners, but that after Mr. Fruchtman had repaid the loan, which he says was repaid, the Fugazys would become control shareholders in Travelco. Thus, Mr. Fugazy not only had from the outset of this indemnity agreement a right to obtain the controlling interest in Travelco, but he and his brother Louis actively did receive such interest while officers and directors of Diners and DWT. It was also established at the trial that the Fugazy brothers were officers and directors of Travelco between 1967 and 1972 (Tr. 1552)--another violation of their agreements with Diners and DWT and in violation of the fiduciary duties owed toward those defendants.

115. Diners and DFT considered a possible competing interest of the plaintiffs in the 342 Madison office (Travelco New York) serious enough to warrant inclusion of a further warranty by the plaintiffs in their amended employment agreements of October 1, 1968 (Plaintiffs' Exhibit 22), as follows:

"In consideration of the execution by DFT of this Employment Agreement, the Employee agrees that for a period commencing on the date of his employment hereunder and terminating either fifteen (15) years from that date or five (5) years after Employee ceases to be an employee of DFT, whichever be later, he will not, in any manner, directly or indirectly, engage in the credit card business, the collection agency business, the business of operating travelers or travel clubs, the business of providing travel or related services or licensing or franchising others to provide such services or

in any business which competes directly or indirectly with any of the fields in which Diners is presently engaged, either directly or through subsidiaries, and he will not directly or indirectly own, manage, operate, join, control or participate in the ownership, management, operation or control of or be employed by or connected in any manner with, any corporation, firm or business that is so engaged without the prior written consent of Diners. For the purposes of the foregoing, (i) Travelco, Inc. (Pa.) and Travelco, Inc. (N.Y.) shall be deemed engaged in the travel business, and (ii) the leasing, management or ownership of hotels or similar establishments shall be deemed not to be businesses competitive with any of the fields in which Diners is presently engaged, either directly or through subsidiaries." (Plaintiffs' Exhibit 22, page 6) (emphasis added).

116. It is respectfully submitted that there was established at the trial a clear violation of the purchase agreement, related documents and the employment agreements by plaintiffs by virtue of their retention of both an indemnity and ownership interest in the branch office at 342 Madison Avenue, and a violation of Rule 10b-5 by the non-disclosure of these material facts, that there was no evidence to the contrary, and that the jury erred as a matter of law in failing to find that these plaintiffs had breached their agreements with Diners and their fiduciary duties to Diners and DFT and had violated Rule 10-5 in connection with the 1967 and 1968 acquisitions of Diners' stock. Said defendants' motion for a directed verdict on those claims should have been granted at the close of all the evidence, and it is respectfully requested that judgment notwithstanding the verdict now be entered for Diners and Diners World Travel on said claims, either with a hearing on damages, or in the alternative, said defendants respectfully request that a new trial be ordered on their counterclaims on the ground that the jury's verdict was against the weight of the evidence, indeed, was not supported by any evidence at all.

WHEREFORE, deponent respectfully requests that defendants be granted judgment notwithstanding the verdict and a new trial as requested herein and in the notice of motion submitted herewith and that defendants be granted such other and further relief as the Court deems just and proper.

JOSEPH J. SANTORA

Sworn to before me this
26 day of June, 1975

ARLENE LAFATA
Notary Public, State of New York
No. 24-7776300
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

MARX & CO., INC., et al.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

WILLIAM D. FUGAZY, et ano.,

Third Party Defendants.

----------X

WILLIAM D. FUGAZY, et ano.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

MARX & CO., INC., et al.,

Additional Defendants on the Counterclaims.

----------X

Consolidated Case

70 Civ. 3064

72 Civ. 4324 (RJW)

SUPPLEMENTAL AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOSEPH J. SANTORA, being duly sworn, deposes and says:

1. Deponent is a member of the firm of Hardee Barovick Konecky & Braun, attorneys for the above captioned defendants, and is fully familiar with the facts and circumstances set forth herein.

2. This affidavit is submitted in accordance with the suggestion of the Court in support of defendants' application to correct the record of the trial in the above action as set forth in deponent's letter to the Court dated June 23, 1975.

3. Deponent's recollection is that at the close of plaintiffs' case on May 14, 1975, defendants had received no notification that plaintiffs would call an expert witness concerning the 1969 contract claim on rebuttal. Deponent's first knowledge of such a proposed witness came in a conference held in the robing room following the conclusion of testimony on May 15. At that point, defendants had commenced presentation of their case and were taking the testimony of their third witness. At the conclusion of the proceedings on May 15, Mr. Fredericks indicated that plaintiffs "were considering" calling an expert witness on rebuttal to testify concerning the 1969 claim. At that point, deponent objected to the presentation of a witness who had not been previously listed in the pre-trial order and whose identity was unknown to deponent. The Court did not rule on the question at that time but directed Mr. Fredericks to reach a decision on the matter at once and to thereupon notify defendants' counsel.

4. On the following day, Friday, May 16, deponent's office received by hand delivery at approximately 5 p.m. a letter to plaintiffs' counsel of even date advising that

plaintiffs "intend to call Stanley Friedman" as an expert witness in this action and indicating that Friedman's testimony would relate to "registration requirements of the Securities and Exchange Commission as they relate to plaintiffs' claim...". A copy of that letter is annexed hereto as Exhibit A.

5. When the trial resumed on May 19, counsel engaged in a bench conference before Your Honor in connection with the proposed testimony of Mr. Friedman. During that conference, deponent objected to permitting Friedman to testify at all on the grounds, inter alia, that he had not been identified in the pre-trial order, surprise and that Mr. Friedman would not be a proper rebuttal witness. During said conference, it was discussed between counsel and the Court that defendants were not presenting an expert witness on the contract claim. It is deponent's recollection that the Court at one point advised counsel that it did not consider such an expert to be technically a proper rebuttal witness in that situation. In addition, the Court asked Mr. Fredericks why he had not called the witness on plaintiffs' case-in-chief. In fact, it is deponent's recollection that the Court actually stated that plaintiffs should have called the expert on their case-in-chief. During said conference, deponent reminded the Court and counsel that on previous occasions when defendants

had sought to introduce documents not listed in the pre-trial order, plaintiffs had objected on the basis of surprise and, in some instances, the Court had sustained the objections on that basis. Indeed, deponent's present recollection of those instances is that the Court permitted admission of documents not listed in the pre-trial order only when certain safeguards were employed to protect the adverse party from being surprised.

6. At the conclusion of the bench conference, the Court overruled deponent's objection and ruled that the expert would be permitted to testify on rebuttal. Deponent recalls that the reporter was present throughout this conference and assumed at the time that the matter was being reflected in the record of the trial. However, deponent has been unable to find any reference to this conference on May 19 in the transcript for May 19 or elsewhere in the record.

7. With respect to the letter dated June 23, 1975 of plaintiffs' counsel, deponent believes the letter contains certain inaccuracies. However, deponent will not respond with respect to those inaccuracies herein since many of them relate to matters beyond the scope of the instant application.

8. In any event, deponent is absolutely certain that the first knowledge he received of the identity of the witness was through the letter annexed hereto as Exhibit A, and deponent's first knowledge that plaintiffs intended to call an expert on rebuttal came in the discussion in Your Honor's robing room at the end of the day on May 15.

WHEREFORE, deponent respectfully requests that the Court grant the instant application to reflect the contents of the May 19 bench conference in the record of the trial herein, and grant such other and further relief as the Court may deem just and proper.

JOSEPH J. SANTORA

Sworn to before me this
26th day of June, 1975

Notary Public

ELLEN RETTER
Notary Public, State of New York
No. 31-8550085
Qualified in New York County
Commission Expires March 30, 1976

A-296

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TELEX-TWX NUMBER
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710 581 0170

May 16, 1975

Marx v. Diners' Club

Dear Joe:

Please be advised that the plaintiffs intend to call Stanley Friedman, Esq., a member of the firm of Shereff, Friedman, Hoffman & Goodman, to testify as an expert witness in the Marx v. Diners' Club action. Mr. Friedman will testify on the registration requirements of the Securities and Exchange Commission as they relate to plaintiffs' claim that the defendants failed to promptly file and to use best efforts to make effective a Registration Statement covering the restricted shares of Diners' Club stock held by the plaintiffs.

Sincerely yours,

Michael E. Twomey

Michael E. Twomey

Joseph Santora, Esq.,
Messrs. Hardee, Barovick,
Konecky & Braun,
One Dag Hammarskjold Plaza,
New York, New York 10017.

lh

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AFFIDAVIT OF BARRY FREDERICKS IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT NOV OR NEW TRIAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

WILLIAM D. FUGAZY, et ano.,

Third-Party Defendants.

Consolidated Case
72 Civ. 4324

70 Civ. 3064 (RJW)

WILLIAM D. FUGAZY, et ano.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

MARX & CO., INC., et al.,

Additional Defendants on the Counterclaims.

AFFIDAVIT

STATE OF NEW YORK)
: :ss.:
COUNTY OF NEW YORK)

BARRY I. FREDERICKS, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and a member of the firm of Harris, Fredericks & Korobkin, counsel for plaintiffs in the above-captioned consolidated action, and make this affidavit in opposition to the motion of

defendants for judgment notwithstanding the verdict with respect to plaintiffs' breach of contract claim and defendants' counterclaims and in opposition to defendants' alternative motion for a new trial with respect to plaintiffs' breach of contract claim and defendants' counterclaims.

2. Plaintiffs' opposition to defendants' motions is supported by the accompanying memorandum of law as well as by my affidavit, sworn to the 27th day of June 1975, a copy of which is annexed hereto as Exhibit A, which responds separately to the supplemental affidavit of Joseph J. Santora, counsel for defendants, sworn to the 26th day of June 1975.

3. The trial in the instant case commenced on Tuesday May 6, 1975 and was concluded on Wednesday May 28, 1975, when the jury returned a verdict in plaintiffs' favor on plaintiffs' breach of contract claim in the amount of $533,000 (Tr. 2007-08*). After the jury returned its verdict, defendants' counsel moved orally for judgment notwithstanding the verdict with respect to plaintiffs' breach of contract claim. The Court advised defendants' counsel that in its view there was enough evidence in the record for the jury to find that Diners had violated its contractual obligations and that a verdict in plaintiffs' favor was therefore warranted (Tr. 2012). Notwithstanding the statement by the Court, defendants' counsel decided to pursue the instant motion, then requested further time to file their papers and on June 26, 1975, defendants served their papers on plaintiffs' counsel.

4. This is the third time in this lawsuit that

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* References to the trial transcript will be identified "Tr. ____."

defendants are making the instant motion. Besides their oral motion for judgment notwithstanding the verdict, defendants also moved for a directed verdict in their favor after the conclusion of plaintiffs' case (Tr. 903-26) and again after both sides rested (Tr. 1807-36). Defendants' formal written application has added nothing to these prior applications but rather it is merely a restatement of the same arguments that they set forth orally, with the added window-dressing of specific references to trial transcript pages and trial exhibits. As this affidavit and the accompanying memorandum will demonstrate, more than sufficient evidence was put before the jury to support the jury's verdict.

Plaintiffs' Breach of Contract Claim

5. On October 10, 1967, Diners and Fugazy Travel Bureau, Inc. ("Fugazy Travel Bureau") entered into an agreement pursuant to which Diners acquired the assets of Fugazy Travel Bureau for stock and other consideration (P. Exh. 5*). Plaintiffs, the shareholders of Fugazy Travel Bureau, received restricted Diners' Common Stock which precluded them from reselling or otherwise disposing of or distributing the shares in the absence of an effective registration statement under the Securities Act of 1933 or unless Diners received from its counsel an opinion to the effect that registration was not required under the Securities Act of 1933 (P. Exh. 5, ¶ 10.1(a)). Paragraph 10.2(b) of the agreement, however, provided for the registration of plaintiffs' restricted

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* Plaintiffs' trial exhibits will be identified as "P. Exh. __" and defendants' trial exhibits will be identified as "D. Exh. __."

shares upon notice by plaintiffs that they desired Diners to file a registration statement. Paragraph 10.2(b) provided:

> "If Diners shall not have filed any such registration statement subsequent to January 1, 1968 and before January 1, 1969, then, provided there are outstanding more than 25,000 shares bearing legend provided for in Section 10.1(c) hereof, the registered holders thereof (but not less than all of them) may, at any time after January 1, 1969, notify Diners that they desire that Diners file such a registration statement, but only with respect to all such shares then owned by all such holders. Unless Diners shall have received an opinion from its counsel that registration is not required, or if Diners and all such registered holders, together proceeding expeditiously and in good faith after such notice, cannot obtain from the Securities and Exchange Commission a "no-action" letter with respect to the sale of such shares, then Diners shall promptly file a registration statement and use its best efforts to cause such registration statement to become effective. Diners may include in such registration statement such other of its securities as it may desire. Anything to the contrary notwithstanding, Diners need not file any such registration statement until it may lawfully use its regularly prepared fiscal year end financial statements, as a part of such registration statement. The notifying holders shall pay Diners in advance an amount sufficient to reimburse Diners for one-half of all registration fees, printing costs, auditing fees (but only in excess of normal fees paid by Diners for its fiscal year end audit), legal fees and all other incidental out-of-pocket expenses incurred in connection with such registration statement."

6. Pursuant to the requirements of Section 10.2(b) of the acquisition agreement, plaintiffs notified Diners on April 16, 1969 that they were requesting Diners to file with the SEC a registration statement with respect to their shares of Diners' Common Stock (P. Exh. 27).

7. Defendants' counsel in his moving affidavit charges that plaintiffs offered no testimony concerning the notification by plaintiffs to Diners that they were requesting registration (affidavit of Joseph J. Santora, sworn to the 26th day of June 1975, hereinafter "Santora affidavit," ¶ 11, p. 7). Defendants' counsel is incorrect in his statement.

Plaintiff Otto Marx testified as follows concerning plaintiffs' request for registration:

> "Q. Mr. Marx, I show you Exhibit 27 in evidence, which is a letter to Diners' Club, attention Mr. Bloomingdale. Is that your signature (handing)?
>
> A. Yes, it is.
>
> Q. Can you tell us the circumstances under which you wrote that letter?
>
> A. In accordance with the contract that we signed in October of 1967, we were permitted to have our shares registered once the audited figures were prepared and ready, if we so requested it, in the year 1969.
>
> Q. And that was your request for a registration?
>
> A. Yes." (Tr. Marx 700)

Similarly, plaintiff John Summerlin, Jr. testified that his father on April 16, 1969 requested Diners to register plaintiffs' shares (Tr. Summerlin 559-61). And plaintiff Louis Fugazy also testified that plaintiffs requested registration on April 16, 1969 (Tr. L. Fugazy 615-16, 636), as did his brother, William Fugazy (Tr. W. Fugazy 202-04). In any event, plaintiffs' April 16, 1969 notification to Diners speaks for itself and demonstrates conclusively that plaintiffs complied with paragraph 10.2(b) of the agreement in requesting registration.

8. Plaintiffs claim that Diners did not fulfill its contractual obligations as set forth in paragraph 10.2(b) of the acquisition agreement. Diners was obligated "to promptly file a registration statement and use its best efforts to cause such registration statement to become effective." Defendants charge surprise with respect to plaintiffs' claim that Diners failed to promptly file (Santora affidavit, ¶ 11, p. 6). However, defendants' charge is totally negated by the operative facts. At the commencement

of trial on May 6, 1975, plaintiffs handed up to the Court and served upon defendants a trial memorandum which set forth in detail plaintiffs' entire case. In that memorandum, plaintiffs set forth their entire argument that Diners failed to promptly file a registration statement. At no time during the course of trial did defendants object, on the ground of surprise or otherwise, to the presentation of testimony and documentary evidence concerning plaintiffs' claim that Diners failed to promptly file a registration statement. Moreover, in a letter dated May 16, 1975 from Michael E. Twomey, an attorney associated with Olwine, Connelly, Chase, O'Donnell & Weyher, to Mr. Santora, a copy of which is annexed as Exhibit A to defendants' moving affidavit, Mr. Twomey stated that Stanley Friedman would testify as an expert witness "on the registration requirements of the Securities and Exchange Commission as they relate to plaintiffs' claim that defendants failed to promptly file and to use best efforts to make effective a Registration Statement covering the restricted shares of Diners' Club stock held by the plaintiffs." Moreover, plaintiffs in their complaint set forth paragraph 10.2(b) in its entirety and charged defendants with failing to use their best efforts to cause a registration statement to become effective; failure to use best efforts includes failure to promptly file the registration statement.

9. Defendants contend that plaintiffs offered no evidence to support their claim that Diners failed to promptly file a registration statement and failed to use its best efforts to cause a registration statement to become effective. The trial testimony and the documentary

evidence demonstrate that defendants' claim is totally without foundation.

10. Plaintiffs introduced at trial two copies of the April 16, 1969 notification by plaintiffs to Diners requesting registration, both of which contained handwritten notes (P. Exhs. 27 and 28). Plaintiffs' Exhibit 27 contains a handwritten note from George Faunce, president of Diners, to Harold Johnson, executive vice president of Continental and a director of Diners (Tr. Johnson 1184, 1186). The note states: "Harold -- Alfred [Bloomingdale] asked me to send this to you and Mr. Herd. He wants to know your position? -- George." Plaintiffs' Exhibit 28 contains two handwritten notations, one from George Faunce to J. Victor Herd and the second from J. Victor Herd, chairman of the board of Continental and a director of Diners (Tr. Herd 1228, 1230), to Harold Johnson. The first notation states: "Mr. Herd -- Alfred asked that I send this to you and Harold -- George." The second notation states: "Mr. Harold Johnson -- Anything we should be doing. -- J.V.H." Although Faunce informed Herd and Johnson, the Continental representatives on the Diners' board, about plaintiffs' request for registration and sought their advice on the action to be taken by Diners, he did not inform the other members of the Diner's board (Tr. Faunce 1702)

11. Diners' blatant disregard for its contractual obligations under paragraph 10.2(b) is exemplified by Plaintiffs' Exhibit 29, Johnson's response to Herd's question as set forth in the handwritten notation contained in Exhibit 28. In a letter to Mr. Herd dated April 24, 1969, Harold E. Johnson states:

"The attached letter, I believe, is an effort on the part of Otto Marx, Jr. to have Continental purchase his shares.

To my way of thinking there is nothing that needs to be done at the present time. Mr. Bloomingdale may discuss this at a later date but my reaction is to do nothing." (Emphasis added)

Plaintiffs' Exhibits 27, 28 and 29 were introduced as part of plaintiffs' case in chief, during the direct examination of Mr. William Fugazy (Tr. W. Fugazy 203-06).

12. Defendants' own witnesses confirmed that Diners did nothing to prepare the registration statement until late July 1969. Jules T. Asch, Diners' executive vice president, testified that he was responsible for the history and description of the business contained in Plaintiffs' Exhibit 30, the S-1 registration statement filed by Diners on August 28, 1969 (Tr. Asch 1169). Asch further testified that he began working on the registration statement sometime in July 1969 and that it probably took less than three weeks from beginning to end to complete his portion (Tr. Asch 1170). Thus, Asch waited three months from the time Diners received notice that plaintiffs were requesting registration to begin his work on the registration statement.

13. Asch testified that he was also responsible for drafting the narrative part of Diners' annual reports to shareholders and that he usually began his work on the project roughly a month prior to the issuance of the report (Tr. Asch 1167-68). Asch testified that he prepared the narrative part of Diners' 1969 annual report to shareholders (Tr. Asch 1168), Exhibit 31, which was mailed to Diner's shareholders in the latter part of June 1969. Thus, although Asch was working on the 1969 annual report to shareholders in

May and June 1969, he did not begin his work on the registration statement until July 1969, three months after notice was given by plaintiffs.

14. As for Diners' 1969 annual report, it was established at trial that the chairman's letter was dated June 16, 1969 and that the report of Touche, Ross, Bailey & Smart, Diners' certified public accountants, with respect to Diners' March 31, 1969 consolidated financial statements, was dated June 6, 1969, two and one-half months prior to the filing of the registration statement (Tr. W. Fugazy 208; Marx 700-01). In the opinion of plaintiffs' expert witness, Stanley Friedman, Diners should have begun preparing the historical portion of the registration statement upon receiving notice from plaintiffs, even though its audited financial statements were not ready until June, and that Diners should have filed a registration statement approximately two weeks after June 6, 1969, the date of the accountants' report. Mr. Friedman testified:

> "Q. Mr. Friedman, based upon Exhibit 31, the date upon which the financials of Diners' Club for the year March 31, 1969 was certified by Touche, Ross, and in consideration of Exhibit 28, the demand for registration as of April 16, 1969, do you have a professional opinion as to when a registration statement should have been filed in compliance with the demand made in Exhibit 28?
>
> A. Yes, I do.
>
> Q. Would you give us that opinion, please?
>
> A. I believe that to fulfil the covenant in the circumstances the registration statement should have been filed approximately two weeks after June 6th of that year.
>
> Q. Would you tell the ladies and gentlemen of the jury the factors you considered in reaching that opinion?
>
> A. Yes.

The letter requesting registration was delivered on April 16th. The company had undertaken in its contract promptly to file upon receipt of the request -- And the company would then use its best efforts to proceed. Ordinarily when one -- In my experience, when a request for registration is made and it is a request that has a basis in a contract, we assume that we would start to prepare the textual portion of the prospectus immediately. The registration statement can be said for this purpose to consist of two elements, a textual portion describing the company and its business and financial statements which contain financial information. The financial statements can't be prepared until after the end of the particular period covered, and we have seen that the financial statements for the year ended March 31st were not ready until June 6th.

However, in the interim, the company would have been preparing the textual portion of the statements which should have been ready about June so that when that date came they would have financial statements and textual material, and then I would allow them two weeks to integrate the two together and to respond in the text to any questions that arose out of the financial statements.

Furthermore, this company is what is called a reporting company. It was under an obligation to make continuing reports of its activities to the Securities and Exchange Commission on forms which the Securities and Exchange Commission prescribes for the purpose.

One of the forms is called Form 10-K, which is an annual report that has to be prepared and submitted to the Securities and Exchange Commission within 90 days after the end of the fiscal year of the company.

If the company's fiscal year ended on March 31st, the 10-K report would have to be ready and filed with the Securities and Exchange Commission under the regulations of the Commission not later than June 30th. This is an absolute requirement imposed by the regulations.

The company, therefore, would have been preparing the information in the 10-K report. The 10-K report requires information which is very much like the information that is required in the registration statement under the Securities Act which would be necessary to register the shares, which was the subject of Mr. Marx' letter.

Furthermore, the company sent out proxy statements at about this time and an annual report, that is, as soon as -- On June 6th, when it re-

ceived the financial statements, it proceeded to send out notice of a meeting to be held in July. To a significant extent the information contained in the proxy statement and the information contained in the report are information which would have to appear in the prospectus and, therefore, when you add the 10-K report to the Commission and the proxy statement, which is reviewed by the Commission, and report to stockholders which the company is preparing at the same time, there were people in the organization of the company working on the matters, compiling them, which would be included in the registration statement to be filed to register the shares. Therefore, the company has been working on this information at the same time, and when June 6th comes around and they get the financial statements, they should be poised to complete the job within a relatively short time.

Two weeks is an assessment which I would make. It could be shorter. I don't think it could be expected to be longer." (Tr. 1732-35)

15. In support of plaintiffs' claim that Diners failed to promptly file a registration statement and failed to use its best efforts to cause a registration statement to become effective, plaintiffs introduced a number of additional documents as part of its case in chief. Although plaintiffs did not elicit testimony on each of these documents, the documents themselves demonstrate that Diners breached its contractual obligations.

16. Plaintiffs introduced into evidence the August 28, 1969 registration statement for the registration of plaintiffs' Diners' restricted Common Stock (P. Exh. 30). A review of that registration statement demonstrates that it was filed four and one-half months after plaintiffs requested registration, that the textual portion was similar to that contained in Diners' 1969 proxy statement and annual report (P. Ex. 13 -- Diners' proxy statement dated June 20, 1969; P. Exh. 31 -- Diners' 1969 annual report) and that Diners' March 31, 1969 financial statements, which were included in

Diners' 1969 annual report, were included in the registration statement as the most current financial statements of Diners.*

17. Plaintiffs introduced as part of its case in chief the letter of comments from the Securities and Exchange Commission dated October 16, 1969 which set forth the SEC's comments on the non financial portion of the registration statement (P. Exh. 39). With respect to Plaintiffs' Exhibit 39, plaintiffs' expert witness reasoned that October 16, 1969, the date of the SEC's letter of comments, was "40-some odd days after the original filing" and that had Diners done everything that it was supposed to do to cause the registration statement to become effective, the registration statement would have become effective approximately 70 days after the original filing (Tr. Friedman 1790-91). In fact, it was Mr. Friedman's view that 70 days was even too long a period for Diners because Diners was a reporting company which had an obligation to file 10-K's with the SEC and to prepare proxy statements for its shareholders (Tr. Friedman 1793).**

18. Plaintiffs introduced into evidence a letter dated February 18, 1970 from Diners to the SEC requesting that the SEC consent to the withdrawal of the August 28, 1969

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* The report of Touche, Ross, Bailey & Smart was updated from June 6, 1969 to July 18, 1969 with respect to Notes 11 and 13 to the March 31, 1969 financial statements since, in the registration statement, Diners disclosed events in Notes 11 and 13 that occurred subsequent to the issuance of the Touche, Ross June 6, 1969 report. The delay in filing the registration statement caused Touche, Ross to update the footnotes to the financial statements.

** Although defendants emphasize the fact that the 70-day statistic contained in the SEC'S 1970 Annual Report (P. Exh. 54 for identification) was a median, and not an average, figure, it was Mr. Friedman's expert opinion that 70 days was "rather generous" (Tr. Friedman 1793).

registration statement (P. Exh. 41). Plaintiffs further introduced into evidence plaintiff Otto Marx's response to Diners' request to the SEC (P. Exh. 42). Mr. Marx in a letter dated March 11, 1970 to Diners' counsel stated that he would not agree to the withdrawal of the registration statement unless he received an opinion from Diners' counsel that registration was no longer required. Marx stated that in the absence of such an opinion, he was requesting Diners to reinstate the registration statement and thereby meet its contractual obligations under the October 10, 1967 acquisition agreement. The opinion requested by Mr. Marx was not issued and instead Diners' counsel forwarded to Mr. Marx a copy of an opinion dated February 20, 1970 which merely dealt with the transferability of plaintiffs' shares in a tender offer (P. Exh. 43). Despite Mr. Marx's request that the registration statement be reinstated, it was withdrawn (Tr. Marx 701).

19. With respect to the tender offer, plaintiffs introduced into evidence the tender offer dated February 6, 1970 by Continental for Diners' Common Stock (P. Exh. 26). Each of the plaintiffs testified to the tendering of his shares to Continental after it became apparent that the registration statement was not going to become effective (Tr. W. Fugazy 198; Summerlin 560; L. Fugazy 615; Marx 702). In addition, Otto Marx testified that he sold a portion of his shares to John S. Jemison in December 1969 (Tr. Marx 702-03).

20. Evidence was also presented at trial to the effect that Diners' officers did not want the registration statement to become effective. William Fugazy on cross-examination testified that George Faunce and Alfred Bloomingdale asked him to talk to Otto Marx to convince Marx to drop his

request for registration. William Fugazy stated that Diners was concerned with the disclosure of certain problems that Diners was having (Tr. W. Fugazy 304-13).

21. Plaintiff Otto Marx testified on cross-examination to the efforts of Diners to avoid registration. Mr. Marx testified that prior to the time he notified Diners that plaintiffs were requesting registration, he was approached by Alfred Bloomingdale, Diners' chief executive officer, who asked Marx if he was going to request registration. Marx testified that he informed Mr. Bloomingdale that he planned to seek registration and that Bloomingdale's response was "is this necessary?" (Tr. Marx 872). Mr. Marx further testified that after he requested registration and prior to August 28, 1969, the date of filing, he was approached by Diners to find alternatives to registration (Tr. Marx 872-73).* Marx stated that after the SEC's letter of comments was received by Diners, Diners requested Marx to permit Diners to withdraw the registration statement (Tr. 875). Marx further testified that he had a luncheon meeting with Diners' president, George Faunce, at Faunce's request, during which Faunce reiterated Diners' request that Marx permit Diners to either postpone or withdraw the registration statement (Tr. Marx 875-75A). Marx never consented to a postponement of the filing of the registration statement nor to a withdrawal of it (Tr. Marx 701).

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* Although defendants argue that Diners' obligation to file a registration statement did not arise until after the parties ceased or abandoned alternatives to registration (Santora affidavit, ¶ 29, p. 13), Diners' obligation under paragraph 10.2(b) of the acquisition agreement to register plaintiffs' shares was absolute unless Diners received an opinion from counsel that registration was not required or if Diners and plaintiffs were not able to obtain a "no-action" letter from the SEC (P. Exh. 5).

22. Plaintiffs concluded their case in chief with Mr. Marx, after which defendants made their first motion for a directed verdict. Defendants argued that there was not "one piece of supporting evidence" for plaintiffs' breach of contract claim (Tr. 910). Plaintiffs, on the other hand, argued that a case had been made to allow the breach of contract claim to go to the jury (Tr. 916-18). The Court denied defendants' motion and stated:

> "[A]fter having reviewed the two exhibits to which I have made reference and having considered the testimony, I have concluded that the questions, whether the defendants did in fact fail to promptly file a registration statement and did in fact use their best efforts to cause the registration to become effective, having been sufficiently presented by the plaintiff to cause the Court to conclude that the plaintiff on this matter has made out a prima facie case. This is a matter which I will consider again at the close of all the evidence.
>
> Accordingly, the defendants' motion to dismiss the third claim, that is, the claim bottomed on the failure to promptly file a registration statement is denied." (Tr. 924)

23. After the Court denied defendants' motion for a directed verdict in their favor on plaintiffs' breach of contract claim, defendants presented their case, including their defense to plaintiffs' breach of contract claim. Defendants attempted to prove by testimony and documentary evidence that Diners' obligation to file a registration statement did not arise until late August 1969. Defendants attempted to show that certain conditions precedent to Diners' obligation to file a registration statement were not met until August 1969. Thus, defendants introduced into evidence documents relating to the reimbursement by plaintiffs of one-half of the registration expenses and documents relating to the indemnification by plaintiffs of Diners against liability arising out

of untrue statements or omissions in the registration statement made in reliance on information furnished to Diners by plaintiffs (D. Exhs. P, PPP, QQQ, RRR, SSS, TTT, UUU, VVV, WWW, IIII and JJJJ).*

24. Defendants' principal witness on their defense of the breach of contract claim was George Faunce, former president of Diners. Mr. Faunce's testimony fully supported plaintiffs' breach of contract claim as Mr. Faunce stated on cross-examination that Diners did not proceed to prepare the registration statement until after Otto Marx returned from vacation in June 1969, two months after plaintiffs requested Diners to file a registration statement (Tr. Faunce 1707-08). With respect to the reimbursement by plaintiffs of one-half of the registration expenses, Mr. Faunce testified that there were discussions between plaintiffs and Diners concerning the difficulty of precisely determining the registration expenses (Tr. Faunce 1710-11). Faunce further testified that Mr. Marx guaranteed the payment of one-half of the registration expenses (Tr. Faunce 1711).

25. It became apparent to plaintiffs during the course of defendants' presentation of their defense to the breach of contract claim that it would be necessary for

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* Defendants in their moving papers complain of the fact that plaintiffs on occasion offered documents into evidence without eliciting testimony on them (Santora affidavit, ¶ 15, p. 7). Obviously, defendants must have forgotten that during a break in the examination of Seymour Flug, they marked sixteen documents relating to their defense to the breach of contract claim and did not elicit any testimony from Mr. Flug or anyone else concerning these documents (Tr. Flug, 1566). Significantly, when defendants make their condition precedent argument in their moving papers, they do not refer to any testimony, but only to documentary evidence (Santora affidavit, ¶¶ 39-43, pp. 17-20).

plaintiffs to present an expert witness in rebuttal to the attempt by defendants to make out defenses to the breach of contract claim. Defendants contend that they were first apprised of this possibility on May 15, 1975, during the presentation of defendants' case (Santora affidavit, ¶ 50, p. 22). As is set forth in my affidavit sworn to the 27th day of June 1975, I informed defendants' counsel on May 1 and 2, 1975 that I was considering calling an expert witness on the breach of contract claim. Defendants' counsel advised me that he would not object to the calling of such a witness and asked that I advise him as soon as I made a determination as to the name of the expert and what he would testify to. I did not finally decide to call an expert witness until after I had had the opportunity to hear and weigh the testimony of defendants' witnesses and review the documents introduced by defendants. Mr. Friedman was not retained formally until May 16, 1975, however, after defendants had presented much of their evidence on their defense to the breach of contract claim. (Annexed hereto as Exhibit B is a letter dated May 16, 1975 from me to Mr. Friedman retaining him to testify in this lawsuit as an expert witness.)

26. Defendants plead surprise in the calling of Mr. Friedman as an expert witness (Santora affidavit, ¶¶ 78, 89-90). Defendants, however, conveniently overlook the surprise to plaintiffs when defendants sought to introduce documents not included in the pretrial order and not produced for plaintiffs' inspection.*

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* During the trial, defendants without prior notice to plaintiffs' counsel, sought to introduce documents that related to other lawsuits and transactions totally irrel-

(footnote continued on next page)

27. Mr. Friedman was a proper rebuttal witness in that he rebutted the contentions of defendants' witnesses that they promptly filed the registration statement and that they used their best efforts to cause the registration statement to become effective. Mr. Friedman's testimony on direct examination was simple and straightforward. The foundation for Mr. Friedman's qualifications as an expert witness was laid (Tr. Friedman 1722-26), and Mr. Friedman then testified as to the documents he reviewed in formulating his opinion on whether Diners promptly filed the registration statement and used its best efforts to cause the registration statement to become effective (Tr. Friedman 1726-29). Mr. Friedman was asked his opinion as to when Diners should have filed the registration statement to be in compliance with the demand made by plaintiffs for registration (Tr. Friedman 1731-32) and Mr. Friedman responded that the registration statement should have been filed within two weeks after the audited financial statements were ready (Tr. Friedman 1732). He was then asked his opinion as to whether Diners used its best efforts to promptly file a registration statement (Tr. Friedman 1735); Mr. Friedman responded that in his expert opinion Diners did not use its best efforts to promptly file a registration statement (Tr. Friedman 1735-36).

28. Mr. Friedman also testified that in his opin-

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evant to the instant case (D. Exhs. I, J, K, L, M and N). The Court when learning that these documents had not been produced for plaintiffs ordered them produced. Similarly, plaintiffs had requested defendants to produce all documents relating to accounting comments by the SEC. Defendants claimed that they were not in possession of any such documents. Yet, as if by magic, when the time was ripe for defendants to introduce such a document, it miraculously appeared (D. Exh. MM).

ion the discussions between Diners and plaintiffs concerning the reimbursement of registration expenses did not relieve Diners of its obligation to promptly file the registration statement (Tr. Friedman 1741). As Mr. Friedman testified after reviewing the various correspondence, the question of registration expenses did not arise until July 15, 1969, well after the registration statement should have been filed, June 20, 1969 (Tr. Friedman 1741-42). Mr. Friedman further testified that the registration statement should have become effective about the end of August 1969 and that Diners did not use its best efforts to cause the registration statement to become effective (Tr. Friedman 1744-48).

29. The whole issue of the reimbursement by plaintiffs for the registration expenses was raised as a ruse by Diners to avoid its obligation to promptly file a registration statement. As defendants are well aware, plaintiffs did not prepay the registration expenses because Diners constantly revised its estimate of the cost of registration. Thus, by letter dated July 15, 1969, George Faunce requested Otto Marx to tender to Diners $35,135, which was to represent one-half of the cost of registration (D. Exh. PPP).* On August 15, 1969, Diners' counsel, Julian Weber, forwarded a second letter to Marx, revising the estimate of the cost of registration and requesting that Marx forward a check in the amount of $28,120, representing one-half of the revised amount (D. Exh. QQQ). Subsequently, Marx had a discussion with Alfred

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* Diners' initial estimate of the cost of registration was $30,000, of which $15,000 would have been the responsibility of plaintiffs. The $30,000 amount is contained in a confidential memorandum from Faunce to Bloomingdale dated May 16, 1969 (D. Exh. SS).

S. Bloomingdale, Diners' chairman of the board and chief executive officer, concerning Diners' inability to accurately determine the costs of registration. That discussion resulted in Otto Marx agreeing to reimburse Diners for one-half of the registration expenses "after the registration statement became effective within 30 days after [receipt] of the itemized bills approved by both parties" (D. Exh. RRR). Marx, by letter dated August 22, 1969, to Julian Weber, agreed to personally guarantee that the registration expenses would be paid (D. Exh. P). That August 22, 1969 letter was subsequently modified by a letter dated August 25, 1969 from Marx and William Fugazy to Diners, whereby Marx and William Fugazy together personally guaranteed that the registration expenses would be paid (D. Exh. WWW).

30. On cross-examination by defendants' counsel, Mr. Friedman enumerated the four major reasons for his determination that Diners failed to use its best efforts to cause the registration statement to become effective. Mr. Friedman stated that these reasons were:

(a) Diners did not proceed to prepare the registration statement when it received plaintiffs' request;

(b) Diners did not file the registration statement on June 20, two weeks after its receipt of its audited financial statements;

(c) Diners waited until August 28 to file the registration statement, two months after it should have been filed; and

(d) Diners did not begin to work on the historical part of the prospectus until July or

August (Tr. Friedman 1758-59).

31. Defendants object in their moving papers to certain of Mr. Friedman's testimony on the ground that he testified on the interpretation of contracts when he was only qualified as an expert in securities law (Santora affidavit, ¶ 53, p. 23). Defendants' counsel seems to have overlooked the fact that they were the ones who asked Mr. Friedman the questions which the defendants claim were improper. Finally, defendants' attempt to buttress their conditions precedent defense through testimony of Mr. Friedman is unfounded. For on cross-examination, Mr. Friedman's opinion remained unchanged, and he stated that Diners should have filed the registration statement by June 20, 1969 and that the registration statement should have become effective in late August 1969. In response to defense counsel's question, Mr. Friedman stated:

> "Q. Because of the date on these comments, October 16th, and your receipt of later comments, do you still take the position that that statement should have been ready with[in] 70 days of August 28?
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> A. My position was that it should have been ready within 70 days of June 20th. This was October 16, which is about 40-some odd days after the original filing. Had they done everything that they were supposed to do this one could have been effective 70 days after August 28th, I believe. That is, however, irrelevant to my view." (Tr. Friedman 1790-91).*

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* Defendants contend that the only evidence presented to support plaintiffs' breach of contract claim was the expert testimony of Mr. Friedman and that his testimony must have been the basis for the jury's verdict (Santora affidavit, ¶¶ 63-78, pp. 27-33). Defendants have overlooked the Court's instruction to the jury during the course of Mr. Friedman's testimony on the weight to be given to expert testimony. The Court stated:

> "Ladies and gentlemen, that means that this witness can be asked his opinion and he may testify to his opinion. You are to give his

(footnote continued on next page)

32. With the conclusion of Mr. Friedman's testimony, both sides rested. Defendants then made a second motion for a directed verdict in their favor with respect to plaintiffs' breach of contract claim. Defendants argued as they do in their moving papers that there were conditions precedent to Diners' obligation to file the registration statement, which were not met until August 26, 1969 (Tr. 1824-25). The Court expressed its view that that argument should be left to the consideration of the jury (Tr. 1825). Defendants' counsel also stated, as they do here, that Mr. Friedman's testimony should be given no weight (Tr. 1826-27). The Court, after hearing defendants' arguments, found that defendants had not "made out a sufficient legal case to justify a directed verdict with respect to . . . the best efforts claim" (Tr. 1828).

33. Plaintiffs' best efforts claim, for which defendants' counsel in his opening statement suggested plaintiffs would apologize (Tr. 55), was given to the jury for its consideration, and the jury, after many hours of deliberation, returned a verdict in plaintiffs' favor in the amount of $533,000 (Tr. 2007-08). Defendants' counsel then made its oral motion for judgment notwithstanding the verdict on the breach of contract claim (Tr. 2011-17). The Court advised defendants' counsel that in its view there was enough in the record for the jury to find that Diners did not use

---

opinion such weight as you deem appropriate. That may be a great deal of weight, it may be moderate weight, it may be little weight, or no weight at all." (Tr. 1726).

Although defendants' counsel might wish to engage in such speculation, it is not within the reasonable exercise of this Court's authority to question the mental processes of the jury.

its best efforts to cause a registration statement to become effective and that a verdict in plaintiffs' favor was warranted (Tr. 2012). Defendants' instant motion on plaintiffs' breach of contract claim is simply a rehash of their motions made at trial. As the prior motions were denied, plaintiffs' instant motion should be denied.

Defendants' Counterclaims

34. Defendants have also moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, on their counterclaims. As with their motions on plaintiffs' breach of contract claim, defendants moved for a directed verdict on their counterclaims after both sides rested and moved orally for judgment notwithstanding the verdict. With respect to defendants' motion for a directed verdict on defendants' counterclaims, the Court apparently viewed that motion as having absolutely no merit. The Court did not even want to hear oral argument (Tr. 1827) and denied defendants' motion (Tr. 1829).

35. Defendants' instant motion relates solely to the Travelco transaction. Defendants contend that plaintiffs retained an interest in a branch travel office located at 342 Madison Avenue after the purchase of Fugazy Travel Bureau by Diners in violation of the acquisition agreement (Santora affidavit, ¶ 100, pp. 43-44). As plaintiffs testified at trial and as the documents demonstrate, plaintiffs did not retain an interest in Travelco after the acquisition of Fugazy Travel Bureau by Diners. Implicit in the jury's verdict is its finding that plaintiffs did not retain such an interest. As defendants pointed out (Santora affidavit,

¶ 101, p. 44), the Court specifically charged the jury on the Travelco transaction:

> "If you find that the plaintiffs maintained a direct or indirect interest in the franchise at 342 Madison Avenue during the time that they were officers and/or directors of Diners, or any of its subsidiaries . . ., you may return a verdict for the defendants against the plaintiff who you find to have breached his fiduciary duties on this claim." (Tr. 1973).

36. William Fugazy was called as a witness by defendants as part of their direct case and questioned about the Travelco transaction. Mr. Fugazy stated that prior to the acquisition of Fugazy Travel Bureau by Diners, the shareholders of Travelco were William Fugazy, Louis Fugazy and Irwin Fruchtman (Tr. W. Fugazy 1520). On cross-examination, Mr. Fugazy testified that he no longer owned an interest in Travelco at October 30, 1967 (Tr. 1551). To that effect, Otto Marx, William Fugazy and Louis Fugazy executed an affidavit on October 30, 1967 as part of the acquisition of Fugazy Travel Bureau by Diners in which they stated that they had divested themselves of any interest, direct or indirect, in Travelco (D. Exh. EEE).

37. Defendants contend that the indemnification running from plaintiffs to Fruchtman constituted an ownership interest by plaintiffs in Travelco. The evidence does not support defendants' position. On August 1, 1967, William Fugazy, Louis Fugazy and Irwin Fruchtman entered into an agreement pursuant to which William Fugazy and Louis Fugazy agreed to indemnify and hold Mr. Fruchtman harmless against any and all losses arising out of Mr. Fruchtman's guarantee to the Franklin National Bank of a loan by Franklin to Travelco (D. Exh. FFF). Mr. William

Fugazy was questioned about this loan by defendants' counsel on direct examination and testified that he merely guaranteed Mr. Fruchtman against losses if Travelco was not able to pay off the loan to the bank. Mr. Fugazy further testified that the loan was paid off in six or seven months and that he was never liable on his indemnity to Mr. Fruchtman (Tr. W. Fugazy 1528). Mr. William Fugazy further testified that the indemnity was not against losses, but only an indemnity on the Franklin National Bank loan (Tr. W. Fugazy 1528-29).

38. With respect to the indemnification by William Fugazy and Louis Fugazy, Otto Marx and John Summerlin, although they had never been shareholders in Travelco, agreed to indemnify William Fugazy and Louis Fugazy for one-half of William Fugazy's and Louis Fugazy's liability to Mr. Fruchtman. That indemnification by Otto Marx and John Summerlin was contained in a letter agreement dated October 13, 1967 between plaintiffs relating to the winding up of the affairs of Fugazy Travel Bureau (D. Exh. GGG). Mr. Marx testified that he gave the indemnification because he felt that "if the Fugazys were indemnifying him [Fruchtman] we [Mr. Marx and John Summerlin] should share half of the responsibility." (Tr. Marx 1468).

39. Defendants contend that plaintiffs retained an interest in Travelco after the acquisition of Fugazy Travel Bureau by Diners by virtue of the fact that William Fugazy and Louis Fugazy remained officers and directors of Travelco after the acquisition. Plaintiffs readily admitted at trial that William Fugazy and Louis Fugazy were officers and directors of Travelco (Tr. W. Fugazy 1552). What defendants seem to lose sight of, however, was that Fugazy Travel

Bureau had a management services contract with Travelco, which was fully disclosed to Diners and which became an asset of Diners. As part of its management services contract, William and Louis Fugazy, officers and directors of Fugazy Travel Bureau, became officers and directors of Travelco. In addition, Travelco's appointments in IATA, as with all other franchises, were carried in the name of Fugazy Travel Bureau, requiring that Fugazy Travel Bureau's management team be represented in an executive capacity in Travelco (Tr. Phillips 1279, 1291-92, 1302; W. Fugazy 1522-23). After Diners acquired Fugazy Travel Bureau, the appointments remained in Fugazy Travel Bureau's name, so that Fugazy Travel Bureau's representation in the franchises had to continue (Tr. Phillips 1301-03). Moreover, under the employment agreements entered into between Diners and William and Louis Fugazy, the Fugazys agreed to take on such duties as were assigned to them, including working with the franchises (P. Exh. 7, 22).

40. With respect to the Travelco transaction, full disclosure was made in the schedules to the agreement for the acquisition of Fugazy Travel Bureau by Diners (P. Exh. 6). The transaction is described in the schedules as follows:

> "On June 19, 1967 Fugazy Travel Bureau, Inc. (Fugazy) entered into an option agreement with Travelco, Inc., a New York corporation, (Travelco) which was amended by a letter agreement on June 22, 1967 between the parties, pursuant to which Travelco obtained an option to purchase all of the issued and outstanding capital stock of Fugazy Travel Bureau, Inc. of Illinois (Fugazy Illinois) (the wholly-owned subsidiary of Fugazy which entered into a sister management service agreement on June 19, 1967 with Fugazy for the management of Fugazy's branch office for that part of Manhattan north of Canal Street). The major provisions of the option agreement as amended are as follows:

1. Travelco obtains an irrevocable option exercisable at any time on or prior to June 30, 1972 to purchase all the then issued and outstanding stock of Fugazy Illinois.

2. Travelco shall pay to Fugazy for the option granted under the agreement the sum of $250,000, payable as follows: $75,000 upon the execution of the agreement; $175,000 by five installment payments, the first four in the sum of $40,000 each, payable 1, 2, 3 and 4 years, respectively, after the date of said execution, the fifth in the sum of $15,000 5 years after such date, evidenced by the execution and delivery by Travelco to Fugazy of five promissory notes therefor, it being understood and agreed that Travelco will be entitled to a credit against such installment obligations and notes equal to the amounts paid to Fugazy by Fugazy Illinois pursuant to paragraph 8(a) of the Fugazy - Fugazy Illinois Management Services Agreement.

3. If Travelco has not prepaid to Fugazy the sum of $175,000 on or before the date of its exercise of the option, Fugazy shall place all of the issued and outstanding stock of Fugazy Illinois in escrow with the law firm of Kramer, Marx, Greenlee and Backus, 29 Broadway, New York, New York to be held in escrow until the full sum of $175,000 is paid by Travelco."

41. Disclosure of the Travelco transaction was also made in an option agreement dated October 30, 1967 whereby Fugazy Travel Bureau granted an irrevocable option to Diners/Fugazy to purchase the issued and outstanding stock of Fugazy Travel Bureau of Illinois. That option, which was granted in accordance with paragraph 4.7(b) of the acquisition agreement, was subject to the prior option of Travelco to purchase the stock of Fugazy Travel Bureau of Illinois.

42. The management services agreement, which, pursuant to paragraph 1.1 of the acquisition agreement, became an asset of Diners upon the acquisition of Fugazy Travel Bureau by Diners (P. Exh. 5, P. Exh. 6, Schedule 4), was also disclosed in the schedules to the acquisition agreement and

described as a "sister agreement" to the option agreement entered into between Fugazy Travel Bureau, Inc. and Travelco, Inc. (P. Exh. 6). The management services agreement is described in the schedules to the acquisition agreement as follows:

> "On June 19, 1967 Fugazy Travel Bureau, Inc. (Fugazy New York) entered into a management services agreement with its wholly-owned subsidiary, Fugazy Travel Bureau of Illinois, Inc. (Fugazy Illinois) as a sister agreement to the option agreement entered into between Fugazy Travel Bureau, Inc. and Travelco, Inc., a New York corporation, on that date. The term of the agreement was for 99 years commencing as of June 19, 1966 to and including June 30, 2066. The major provisions of the agreement are as follows:
>
> 1. Fugazy Illinois shall have the exclusive right to sell, handle and arrange all travel services in connection with retail and commercial business from any persons in that part of Manhattan, New York City, North of Canal Street and that Fugazy New York shall have the exclusive right to sell, handle and arrange all travel services from any persons within said area for travel arrangements for groups of 25 persons or more for combined air transportation and hotel reservations or other travel services.
>
> 2. Fugazy Illinois shall manage and operate, and pay all expenses incurred therefor by the Fugazy branch office at 16 West 46th Street (since moved to 342 Madison Avenue) and remit to Fugazy New York so long as it does not hold its own airline conference appointments the net payments due the airlines at least two (2) business days prior to the date payment is due the airlines.
>
> 3. Fugazy Illinois shall maintain sufficient working capital to operate said Fugazy branch office and has agreed to indemnify and hold Fugazy New York harmless against any claims or liabilities incurred by or relating to this branch office.
>
> 4. Fugazy New York shall furnish supervisory and consulting services to Fugazy Illinois and shall maintain in full force and effect appointments in IATA, ATC, TAPSC, TPPC and RTPA until and unless such conference appointments have been transferred to Fugazy Illinois.

5. Fugazy New York authorizes Fugazy Illinois to use, and operate under, the trade name "Fugazy Travel Bureau" and the non exclusive right to the use of the Fugazy New York trade marks, copyright, etc. and the slogan "Established 1870", now and heretofore and hereafter used and identified with the business of Fugazy New York.

6. Fugazy Illinois shall pay to Fugazy New York the sum of $40,000 during each of the first four years of the agreement or 50% of its net earnings during each of those years, whichever is greater, and the sum of $15,000 during the fifth year of the agreement or 50% of net earnings for such year, whichever is greater. Commencing at such time as the aggregate payments hereinabove of Fugazy Illinois equal $175,000, Fugazy Illinois shall pay to Fugazy New York 1% of its gross monthly revenue for the remaining term of the agreement.

7. Fugazy Illinois shall have the right to apply for its own conference appointments in IATA, ATC, TAPSC, TPPC AND RTPA at any time after its aggregate payments hereinabove to Fugazy New York equal $175,000."

43. Thus, full disclosure was made by plaintiffs concerning the Travelco transaction and plaintiffs had divested themselves of all ownership interest in Travelco prior to the acquisition with the exception that plaintiffs agreed to indemnify Irwin Fruchtman against any losses with respect to Fruchtman's guarantee of the loan by the Franklin National Bank to Travelco. That indemnification does not constitute an ownership interest in Travelco as defendants contend. Since plaintiffs did not have an ownership interest in Travelco, they did not breach any of the terms in the acquisition agreement or in the employment agreements.

44. It is respectfully submitted that defendants' motions for judgment notwithstanding the verdict or, in the alternative, for a new trial, with respect to plaintiffs'

breach of contract claim and defendants' counterclaims should be denied.

Barry I. Fredericks

Sworn to before me this
11th day of August, 1975.

Notary Public

MYRTLE B. LANG
Notary Public, State of New York
No. 41-0249350
Qualified in Queens County
Cert. Filed in New York County
Commission Expires March 30, 1977

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants.

-against-

WILLIAM D. FUGAZY, et ano.,

Third-Party
Defendants.

Consolidated
Case
72 Civ. 4324
70 Civ. 3064
(RJW)

AFFIDAVIT IN
OPPOSITION

WILLIAM D. FUGAZY, et ano.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

MARX & CO., INC., et al.,

Additional
Defendants on
the Counterclaims.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BARRY I. FREDERICKS, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and the State of New York, and a member of the firm of Harris, Fredericks & Korobkin, attorneys for the above captioned plaintiffs, and am fully familiar with all of the facts and circumstances set forth herein.

2. This affidavit is submitted in response to the affidavit of Mr. Joseph J. Santora, verified June 26th, 1975, which Mr. Santora states is submitted at the suggestion of the Court.

3. On Thursday, May 1st, and Friday, May 2nd, several days preceding the commencement of the trial of this action, I called Mr. Santora on the telephone concerning the above entitled case. During the course of those conversations, we discussed the order in which I planned to call plaintiffs' witnesses. At that time I advised Mr. Santora that, notwithstanding the fact that they are not named in the Pre-trial Order, there was a possibility I would call a Mr. Covington Hardee, a former partner of defendant counsel's firm and an expert witness. I stated to Mr. Santora that I would not have called Mr. Hardee while he was a partner in the firm, but now that he had retired from the firm and had had some direct dealings and negotiations with the plaintiffs in this matter I might call him. Mr. Santora said that calling Mr. Hardee would be no problem and we discussed Mr. Santora's accepting a subpoena on Mr. Hardee's behalf.

4. During these phone conversations, I also advised Mr. Santora that I was considering the possibility of calling an expert witness to testify with respect to the question of Diners' due diligence efforts under the registration requirements of the acquisition agreement. I told Mr. Santora that I had not made up my mind as to whether I would call such a witness and who I might use as an expert witness. Mr. Santora advised me that there would be no problem, even though he didn't see what an expert witness could testify to, but he would appreciate being advised as soon as I made a determination as to the name of the expert and what he would testify to.

5. It is my recollection that during the course of the trial, which began on May 6th and ran for several weeks thereafter, the question of calling an expert witness in rebuttal was raised informally with the Court during an early bench conference which took place in the courtroom after the jury had been discharged for the day. The informal discussion was had in order to explore the possibility of settlement, and also to aid the Court in determining how long the matter would take to try. I specifically recall that during one of these discussions, prior to the conclusion of defendant's case, there was an off the record discussion about plaintiff calling an expert witness. At that time the Court inquired as to the name of plaintiff's potential expert witness and a discussion was had wherein the Court advised that he had recently had a gentleman by the name of Sargent appear before him on issues similar to those present in the instant case and he found Mr. Sargent to be a very impressive witness, at which point I advised the Court that I had contacted a Mr. Stanley Friedman and thought he might be the witness used.

6. It was during the course of this off the record discussion that the defendants for the first time indicated their objection to plaintiffs calling an expert witness in rebuttal. Defendants' objection was based upon the fact that such a witness had not been named in the Pre-Trial Order. At this point the Court directed counsel for the plaintiffs to advise the defendants as quickly as a determination was made as to the name of the expert witness and the subject matter of the witness' testimony.

7. I do not recall any time during the course of the trial where the court reporter stood idly by and did not take down a formal bench conference between counsel and the Court. Quite to the contrary, I recall numerous instances when the Court had occasion to advise the reporter that the conference between counsel and the Court was an informal one, off the record, and

there was no need for the report to record the discussion. Such incident when the reporter was advised not to record the discussion, it was either with the express or tacit consent of counsel for all parties.

8. Counsel for the defendants' inference that the reporter's transcript is not complete or accurate is not in keeping with the counsel for plaintiffs' view of the conscientious work done by the court reporters during the course of the trial. In the instant case attorneys for both sides and the Court were receiving daily copies of the transcript of the proceedings. Therefor, one would assume that if the defendants' counsel felt that anything was omitted from the transcript, they would have called it to the Court's attention during the course of the proceedings and not some one month after the jury's verdict has been rendered.

9. As indicated in plaintiffs' counsel's letter to the Court, a copy of which is annexed hereto as Exhibit A and incorporated herein by reference, counsel for plaintiffs' recollection does not conform with that of counsel for the defendants. In the view of counsel for the plaintiff, all matters which properly should have been recorded by the court reporter were taken down at the time and defendants' counsel's claim to the contrary is unwarranted and contrary to the facts.

WHEREFORE, it is respectfully requested that defendants' motion be in all respects denied.

Sworn to before me this
27th day of June, 1975

Barry V. Fredericks

Sarita R. Perla

SARITA R. PERLA
Notary Public, State of New York
No. 31-3062913
Qualified in New York County
Commission Expires March 30, 1977

LAW OFFICES

HARRIS, FREDERICKS & KOROBKIN

1271 AVENUE OF THE AMERICAS, NEW YORK, N.Y. 10020 (212) 489-1888/CABLE: LEWLENBAR-NY

BARRY I. FREDERICKS
MEMBER OF N.Y. & N.J. BARS

LEWIS HARRIS

LEONARD KOROBKIN
MEMBER OF N.Y. & CALIF. BARS

EDWARD MARION

NEAL I. ROSENTHAL
COUNSEL

Hon. Robert J. Ward
United States District Judge
United States Courthouse
Southern District
Foley Square
New York, New York 10007

June 23, 1975

Re: Marx/Fugazy v. Diners

Dear Judge Ward:

I have received a copy of a letter addressed to Your Honor by Joseph Santora of the law firm of Hardee Barovick Konecky & Braun, attorneys for the defendant in the above entitled matter.

I have discussed the contents of the letter with my co-counsel, James Tolan of the law firm of Olwine, Connelly, Chase, O'Donnell & Weyher. Neither Mr. Tolan nor I can concur with the statements made by Mr. Santora in his letter. To the best of our recollection the only discussion that took place concerning the plaintiffs calling a rebuttal witness took place off the record at the conclusion of the day's proceedings. As we recall the matter, during the off the record discussion I advised the Court that I had, several days prior to the trial date, advised Mr. Santora that I might be calling an expert witness in rebuttal and that I would let him know as soon as I had resolved the matter in my own mind and had determined which expert I would use. In fact, I recall some vague colloquy off the record between Your Honor and myself discussing the names of available expert witnesses.

At the time that the matter was mentioned I believe Mr. Santora indicated he had no objection, except he noted that the witness was not mentioned in the pre-trial order. At this point Your Honor responded, as Mr. Tolan and I recall, that both sides had bent the pre-trial order out of shape and if that was the only objection, as long as Mr. Santora had been advised of the calling of the witness and the subject and areas to which the witness' testimony would be directed, Your Honor certainly could seek no valid objection for allowing the plaintiffs to call the witness.

CALIFORNIA OFFICE:
2040 AVENUE OF THE STARS, LOS ANGELES, CALIF. 90067 (213) 556-1642

Mr. Tolan and I both clearly recall that all of the discussion about the possibility of calling rebuttal witnesses took place off the record after conclusion of the day's proceedings. Further, that the matter was discussed in response to the informal inquiry by the Court as to the number of witnesses yet to be called, which inquiry was made so that the Court could better judge the time involved in concluding the trial, so as to be able to advise the attorneys whose matter was to commence at the conclusion of the instant action. The absence of any discussions on the record is fully in keeping with Mr. Tolan's and my recollection that the discussions were had informally after the trial was adjourned for the day.

As I advised Mr. Santora, I am leaving the City for several weeks as of June 27th. In my absence Mr. James Tolan, of the Olwine office, is prepared to attend upon the Court in connection with any matters which might arise.

Respectfully submitted,

Barry I. Fredericks

BIF/sp

cc: Joseph Santora, Esq.
James Tolan, Esq.

HARRIS, FREDERICKS & KOROBKIN
1271 AVENUE OF THE AMERICAS, NEW YORK, N.Y. 10020 (212) 489-1888/CABLE: LEWLENBAR-NY

EXHIBIT B

Law Offices
HARRIS, FREDERICKS & KOROBKIN

(212) 489-1504
Cable Address "ATTYGREEN"

1271 Avenue of the Americas, New York, N.Y. 10020

Barry I. Fredericks*
Lewis Harris

*Member N.Y. & N.J. Bars

May 16, 1975

Stanley Friedman, Esq.
Sheroff, Friedman, Hoffman & Gordon
919 Third Avenue
New York, N.Y.

Re: Marx v. Diners

Dear Mr. Friedman:

Pursuant to our telephone conversation this date, I am enclosing the relevant documents in the above entitled action, in preparation for your testifying as an expert witness.

Our clients are F.T. Ventures, Inc., formerly Fugazy Travel Bureau, Otto Marx, Jr., William D. Fugazy and Louis Fugazy.

As I advised you, I will be sending you a question and answer form, hopefully by the end of the day today; if not, the first thing Monday. I will contact you on Tuesday, to discuss the matter with you, in connection with your testimony on Wednesday.

On behalf of our clients, I advise you that your fee of $125.00 an hour is certainly acceptable.

Very truly yours,

HARRIS, FREDERICKS & KOROBKIN

By S/ Barry I. Fredericks

Barry I. Fredericks

BIF/sp
Hand Delivery

bcc: James E. Tolan, Esq.

INDEX NO. 72 Civ. 4324
70 Civ. 3064 (RJW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al.,

Plaintiffs,

- against -

THE DINERS' CLUB, INC., et al.,

Defendants.

- against -

WILLIAM D. PAGAN, et ano.,

Third-Party
Defendants.

A-336

AFFIDAVIT

Olwine, Connelly, Chase, O'Donnell & Weyher
Attorneys for Plaintiffs

299 PARK AVENUE
NEW YORK, N. Y. 10017
688-0400

8/12/75 Aug 11, 1975 (37)

A-337

MEMORANDUM ON BEHALF OF PLAINTIFFS IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT NOV OR A NEW TRIAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

WILLIAM D. FUGAZY, et ano.,

Third-Party Defendants.

Consolidated Case
70 Civ. 3064
72 Civ. 4324

WILLIAM D. FUGAZY, et ano.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

MARX & CO., INC., et al.,

Additional Defendants on the Counterclaims.

MEMORANDUM ON BEHALF OF PLAINTIFFS IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
299 PARK AVENUE, NEW YORK, N.Y. 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

WILLIAM D. FUGAZY, et ano.,

Third-Party Defendants.

Consolidated Case
70 Civ. 3064
72 Civ. 4324

WILLIAM D. FUGAZY, et ano.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

MARX & CO., INC., et al.,

Additional Defendants on the Counterclaims.

MEMORANDUM ON BEHALF OF PLAINTIFFS IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Preliminary Statement

This memorandum is submitted on behalf of plaintiffs Otto Marx, Jr., William Fugazy, Louis Fugazy and John Summerlin in opposition to the motion of defendants for judgment notwithstanding the verdict with respect to plaintiffs' breach of contract claim and defendants' counterclaims and in opposition to defendants' alternative motion for a new trial with respect to plaintiffs' counterclaims.

Trial of this action commenced on May 6, 1975 and was concluded on May 28, 1975, with the jury returning a verdict in plaintiffs' favor in the amount of $533,000. The oral testimony and documentary evidence introduced at trial amply supports the jury's verdict that Diners' Club, Inc. ("Diners") failed to promptly file a registration statement and failed to use its best efforts to cause a registration statement to become effective.

This is the third time in these proceedings that defendants have sought by motion to defeat plaintiffs' breach of contract claim. Defendants moved for a directed verdict at the conclusion of plaintiffs' case, which motion was denied (Tr. 903-26).* After both sides rested,

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* References to the trial transcript will be identified "Tr. __."

defendants made a second motion for a directed verdict, which the Court again denied, finding that the plaintiffs had presented sufficient evidence for the breach of contract claim to be given to the jury for its consideration (Tr. 1807-36).

Despite the gyrations of defendants, the facts, uncontroverted at trial, are that Diners did not file the registration statement until August 28, 1969, four and one-half months after plaintiffs requested registration, and that the registration statement was withdrawn and never became effective, despite plaintiffs' protestations.

A-341

POINT I

THE EVIDENCE FULLY SUPPORTS THE JURY'S FINDING THAT DINERS BREACHED ITS CONTRACTUAL OBLIGATIONS.

The standard to be applied in determining whether a motion for judgment notwithstanding the verdict should be granted is "whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached." Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970); see O'Connor v. Pennsylvania Railroad Co., 308 F.2d 911, 914-15 (2d Cir. 1962).

Similarly, in Fortunato v. Ford Motor Co., 464 F.2d 962, 965 (2d Cir. 1972), the Second Circuit expressed this standard as follows:

> "In determining whether the motions for a directed verdict and a judgment n.o.v. were properly denied, this court must 'view the evidence in the light most favorable to [the non-moving party] and give [him] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.' ... Taking that view of the evidence we must then decide whether or not 'reasonable men' could return a verdict for the plaintiff ...."

Defendants have failed to demonstrate that the evidence is such that "reasonable men" could not have

returned a verdict in favor of the plaintiffs. Indeed, the evidence presented at trial clearly supports the jury's findings.

Under an Agreement dated October 10, 1967, Diners acquired the assets of Fugazy Travel Bureau for stock and other consideration (P. Exh. 5).* Paragraphs 10.2(b) of the agreement provided that Diners, upon receipt of notification from plaintiffs that they desired registration, would promptly file a registration statement for the shares of Diners' Common Stock held by the plaintiffs and would use its best efforts to cause the registration statement to become effective. Paragraph 10.2(b) provided:

> "If Diners shall not have filed any such registration statement subsequent to January 1, 1969, then, provided there are outstanding more than 25,000 shares bearing legend provided for in Section 10.1(c) hereof, the registered holders thereof (but not less than all of them) may, at any time after January 1, 1969, notify Diners that they desire that Diners file such a registration statement, but only with respect to all such shares then owned by all such holders. Unless Diners shall have received an opinion from its counsel that registration is not required, or if Diners and all such registered holders, together proceeding expeditiously and in good

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* Plaintiffs' trial exhibits will be identified as "P. Exh. __" and defendants' trial exhibits will be identified as "D. Exh. __."

> faith after such notice, cannot obtain from the Securities and Exchange Commission a 'no-action' letter with respect to the sale of such shares, then Diners shall promptly file a registration statement and use its best efforts to cause such registration statement to become effective. Diners may include in such registration statement such other of its securities as it may desire. Anything to the contrary notwithstanding, Diners need not file any such registration statement until it may lawfully use its regularly prepared fiscal year end financial statements, as part of such registration statement. The notifying holders shall pay Diners in advance an amount sufficient to reimburse Diners for one-half of all registration fees, printing costs, auditing fees (but only in excess of normal fees paid by Diners for its fiscal year end audit), legal fees and all other incidental out-of-pocket expenses incurred in connection with such registration statement."

Pursuant to the requirements of Paragraph 10.2(b) of the acquisition agreement, plaintiffs notified Diners on April 16, 1969 that they were requesting Diners to file with the SEC a registration statement with respect to their shares of Diners' Common Stock (P. Exh. 27; Tr. Marx 700; Tr. Summerlin 559-61; Tr. L. Fugazy 615-16, 636, Tr. W. Fugazy 202-04).

The evidence clearly shows that, upon receipt of plaintiffs' April 16, 1969 request for registration, Diners, instead of proceeding immediately to prepare the registration statement, communicated with two of its directors to determine what action should be taken.

George Faunce, president of Diners, in a note to Harold Johnson, executive vice president of Continental and a director of Diners, stated:

> "Harold -- Alfred [Bloomingdale] asked me to send this to you and Herd. He wants to know your position -- George." (P. Exh. 27)

On a copy of plaintiffs' request for registration, two notations were made, one from George Faunce to J. Victor Herd, chairman of the board of Continental and a director of Diners (Tr. Herd 1228, 1230), stating:

> "Mr. Herd -- Alfred asked that I send this to you and Harold -- George." (P. Exh. 28)

and the other, from Herd, to Harold Johnson, stating:

> "Mr. Harold Johnson -- Anything we should be doing? -- J.V.H." (P. Exh. 27)

Johnson's response highlights Diners' reluctance to fulfill its obligation to plaintiffs. A letter dated April 24, 1969 from Harold Johnson to J. Victor Herd contained the following response:

> "The attached letter, I believe, is an effort on the part of Otto Marx, Jr. to have Continental purchase his shares.
>
> "To my way of thinking <u>there is nothing that needs to be done at the present time</u>. Mr. Bloomingdale may discuss this at a later date but <u>my reaction is to do nothing</u>." (P. Exh. 29) (emphasis added)

Although Diners' officers informed Herd and Johnson, the Continental representatives on the Diners

board, about plaintiffs' request for registration, they did not inform the other members of the Diners board (Tr. Faunce 1702), an uncontroverted fact from which the jury could properly infer that Diners, with the urging and approval of Herd and Johnson, decided to ignore its obligations under Paragraph 10.2(b) of the Agreement.

Defendants' own witness confirmed that Diners did not begin to prepare the registration statement until late July 1969. Jules Asch, Diners' executive vice president for finance and corporate planning, testified that he was in charge of preparing the historical portion of the registration statement and that he did not commence work on the registration statement until July 1969, three months after plaintiffs requested registration (Tr. Asch 1170). Asch further testified that it probably took less than three weeks from beginning to end to complete his portion (Tr. Asch 1170). Asch also testified that he was responsible for drafting the narrative part of Diners' annual reports to shareholders and that he usually began his work on the project roughly a month prior to the issuance of the report (Tr. Asch 1167-68). Asch testified that he prepared the narrative part of Diners' 1969 annual report to shareholders (Tr. Asch 1168), Exhibit 31, which was mailed to shareholders in the latter part of June 1969.

Thus, although Asch was working in May and June 1969 on the 1969 annual report to shareholders, he did not begin his work on the registration statement until July 1969, three months after notice was given by plaintiffs. In other words, Diners ignored its contractual obligations to the plaintiffs by doing nothing for three months.

It was further established at trial that Diners' fiscal year-end financial statements were available for use by June 6, 1969, the date Diners' public accountants, Touche, Ross, Bailey & Smart, certified the financial statements. Indeed, it was established at trial that Diners "lawfully" used those financial statements as part of Diners' 1969 annual report on or about June 16, 1969, when it mailed the annual report to shareholders. (Tr. W. Fugazy 208; Marx 700-01.) Diners thus delayed for a period of two and one-half months after it "lawfully" used its regularly prepared fiscal year-end financial statements before it filed the registration statement. These uncontested facts more than adequately support the jury's verdict that Diners breached its contractual obligations to plaintiffs.

Moreover, it was the opinion of Stanley Friedman, plaintiffs' expert witness, that Diners should have begun

preparing the historical portion of the registration statement upon receiving notice from plaintiffs, even though its audited financial statements were not ready until June, and that Diners should have filed a registration statement approximately two weeks after June 6, 1969, the date of the accountants' report (Tr. Friedman 1732-35) -- live testimony from which the jury could reasonably conclude that Diners breached its contractual obligations.

Plaintiffs also introduced substantial documentary evidence to support its breach of contract claim. Plaintiffs introduced into evidence the August 28, 1969 registration statement for the registration of plaintiffs' Diners restricted Common Stock (P. Exh. 30). A review of that registration statement demonstrates that it was filed four and one-half months after plaintiffs requested registration, that the textual portion was similar to that contained in Diners' 1969 proxy statement and annual report (P. Exh. 13 -- Diners' proxy statement dated June 20, 1969; P. Exh. 31 -- Diners' 1969 annual report) and that Diners' March 31, 1969 financial statements, which were included in Diners' 1969 annual report, were included in the registration statement as the most current financial statements of Diners.

Plaintiffs also introduced into evidence a letter

dated February 18, 1970 from Diners to the SEC requesting that the SEC consent to the withdrawal of the August 28, 1969 registration statement (P. Exh. 41) and Marx's response to that request by Diners to the SEC (P. Exh. 42). In a letter dated March 11, 1970 to Diners' counsel, Marx stated that he would not agree to the withdrawal of the registration statement unless he received an opinion from Diners' counsel to the effect that registration was no longer required. If such an opinion could not be issued, Marx demanded that the registration statement be reinstated. The opinion requested by Marx was not issued and instead Diners' counsel forwarded to Marx a copy of an opinion dated February 20, 1970 which merely dealt with the transferability of plaintiffs' shares in a tender offer (P. Exh. 43). Despite Marx's request that the registration statement be reinstated, it was withdrawn (Tr. Marx 701; P. Exh. 41).

Evidence was also presented at trial to the effect that Diners' officers did not want the registration statement to become effective. William Fugazy on cross-examination testified that George Faunce and Alfred Bloomingdale asked him to talk to Otto Marx to convince Marx to drop his request for registration. William Fugazy stated that Diners was concerned with the disclo-

sure of certain problems that Diners was having (Tr. W. Fugazy 304-13).

Plaintiff Otto Marx testified on cross-examination to the efforts of Diners to avoid registration. Mr. Marx testified that prior to the time he notified Diners that plaintiffs were requesting registration, he was approached by Alfred Bloomingdale, Diners' chief executive officer, who asked Marx if he was going to request registration. Marx testified that he informed Mr. Bloomingdale that he planned to seek registration and that Bloomingdale's response was "is this necessary?" (Tr. Marx 872). Mr. Marx further testified that after he requested registration and prior to August 28, 1969, the date of filing, Diners approached him with alternatives to registration (Tr. Marx 872-73). Marx stated that after the SEC's letter of comments was received by Diners, Diners requested Marx to permit Diners to withdraw the registration statement (Tr. Marx 875). Marx further testified that he had a luncheon meeting with Diners' president, George Faunce, at Faunce's request, during which Faunce reiterated Diners' request that Marx permit Diners to either postpone or withdraw the registration statement (Tr. Marx 875-75A). Marx never consented to a postponement of the filing of the registra-

tion statement nor to a withdrawal of it (Tr. Marx 701).

Defendants, confronted with the substantial evidence that Diners breached its contractual obligation, argue that it was inadequate for plaintiffs simply to prove that Diners breached the acquisition agreement. Defendants contend that plaintiffs had to prove that "Diners did not engage in any of the other performance possibilities contemplated by the Acquisition Agreement" (Defendants' memorandum in support of its motion for judgment notwithstanding the verdict ("Defendants' memorandum"), p. 5). The primary "performance possibility" raised by defendants is that Diners' obligation to file a registration statement did not arise until certain conditions precedent were met. Defendants argue that since the jury did not find in their favor, the jury must have concluded that "as a matter of law Diners' obligation to so file became absolute before the plaintiffs satisfied the conditions precedent" and that that "conclusion necessarily involve[d] an erroneous determination of law" (Defendants' memorandum, p. 13).

This argument by defendants, although raised as part of its motion for judgment notwithstanding the verdict, is in reality an objection to the Court's jury instructions. The Court specifically charged the jury

on defendants' conditions precedent argument. The Court stated:

> "Diners' contends that plaintiffs were required as a condition precedent to the preparation of that registration statement, to advance to defendant Diners' an amount sufficient to reimburse Diners' for one-half of the expenses of that registration statement, and that the plaintiffs never made any such payment.
>
> "Defendant Diners' also contends that, notwithstanding that plaintiffs were required as a condition precedent to the preparation of that registration statement, to execute an indemnity agreement, plaintiffs refused to execute the indemnity agreement until August 24, 1969, just four days before the actual filing....
>
> "If you find that Diners' failed to promptly file the registration statement as required, your verdict will be for plaintiffs on that question. If you find, however, that Diners promptly filed the registration statement, you still must consider whether or not Diners used its best efforts to cause the registration statement to become effective....
>
> "It is up to you to determine when the registration statement should have been filed and when, with the use of best efforts, the registration statement should have become effective...." (Tr. 1961-63)

Defendants raised no objection to this charge.

Rule 51 of the Federal Rules of Civil Procedure specifically provides that "no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to

consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." A party cannot resurrect such an objection on a motion for judgment notwithstanding the verdict. Jennings v. Boenning & Co., 388 F. Supp. 1294, 1303-04 (E.D. Pa. 1975); see Cohen v. Franchard Corp., 478 F.2d 115 (2d Cir. 1973).

Defendants argue that the plaintiffs were obligated to pay Diners in advance an amount sufficient to reimburse Diners for one-half of all registration expenses and that that obligation was a condition precedent to the obligation of Diners to file a registration statement. In fact, and as the jury could have properly determined, Diners utilized this provision in paragraph 10.2(b) of the Agreement concerning the reimbursement of expenses as a ruse to avoid its obligation to file a registration statement.

As defendants are well aware, plaintiffs did not prepay the registration expenses because Diners constantly revised its estimate of the cost of registration. Thus, by letter dated July 15, 1969 George Faunce requested Otto Marx to tender to Diners $35,135, which was to represent one-half of the cost of registration (D. Exh. PPP), which was estimated to be $70,270. On

August 15, 1969, Diners' counsel, Julian Weber, forwarded a second letter to Marx, revising the estimate of the cost of registration and requesting that Marx forward a check in the amount of $28,120, representing one-half of the revised amount (D. Exh. QQQ).* Subsequently, Marx had a discussion with Alfred S. Bloomingdale, Diners' chairman of the board and chief executive officer, concerning Diners' inability to accurately determine the costs of registration. That discussion resulted in Otto Marx agreeing to reimburse Diners for one-half of the registration expenses "after the registration statement became effective within 30 days after [receipt] of the itemized bills approved by both parties" (D. Exh. RRR). Marx, by letter dated August 22, 1969, to Julian Weber, agreed to personally guarantee that the registration expenses would be paid (D. Exh. P). That August 22, 1969 letter was subsequently modified by a letter dated August 25, 1969 from Marx and William Fugazy to Diners, whereby

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* Interestingly, Mr. Faunce in a confidential memorandum to Mr. Bloomingdale dated May 16, 1969 said that the total cost of registration would only be "in the neighborhood of $30,000," of which Marx's share would have been $15,000 (P. Exh. 55). The gyrations in the costs were such that the jury could reasonably have found that Diners was playing in bad faith a numbers game with Marx as a tactic to avoid its obligations and in breach of its contract.

Marx and William Fugazy together personally guaranteed that the registration expenses would be paid (D. Exh. WWW). Mr. Friedman testified that Marx's actions with respect to the reimbursement of expenses was "the best" that could be expected under the circumstances and that Marx sought to work out an arrangement with Diners in good faith (Tr. Friedman 1763-64).

Plaintiffs' expert, Stanley Friedman, testified that the provision in the acquisition agreement concerning the reimbursement of expenses was inartfully drawn since it called for payments in advance for expenses that could not be determined in advance (Tr. Friedman 1749-49a; 1762-66). That provision stated:

> "The notifying holders shall pay Diners in advance an amount sufficient to reimburse Diners for one-half of all registration fees, printing costs, auditing fees (but only in excess of normal fees paid by Diners for its fiscal year end audit), legal fees and all other incidental out-of-pocket expenses incurreed in connection with such registration statement." (Emphasis added)

The only reasonable way to construe the payment for expenses clause is that plaintiffs were to pay one-half of the expenses incurred -- not "to be incurred" -- in advance of the date the registration statement became effective. In this way, Diners would have an accurate figure for expenses it incurred during registration and the

plaintiffs would be obligated to pay half.

It was Mr. Friedman's expert opinion that Diners should have filed the registration statement by approximately June 20 and that, as a result, the issue of the reimbursement of expenses arose well after Diners breached its obligation to promptly file the registration statement (Tr. Friedman 1741-42). In response to the Court's question, Mr. Friedman testified that the disagreement between the parties concerning the reimbursement of expenses did not alter his opinion that Diners should have filed the registration statement on or about June 20 (Tr. Friedman 1765). Thus, Mr. Friedman did not deem plaintiffs' obligation to reimburse Diners for one-half of the registration expenses a condition precedent to Diners' obligation to promptly file a registration statement (Tr. Friedman 1769-70). In any event, the evidence presented was such that reasonable men could have determined that Diners used the reimbursement clause in bad faith as part and parcel of its game plan to do nothing and breach the obligation to promptly file the registration statement and use its best efforts to cause the registration to become effective.

Defendants also argue that the provision in paragraph 10.2(c) of the Agreement concerning indemnification was a condition precedent to Diners' obligation to file

the registration statement. Plaintiffs were obligated under paragraph 10.2(c) to deliver to Diners an indemnity agreement indemnifying Diners, its officers, directors and any person controlling Diners against liabilities based on untrue statements in or omissions from the registration statement made in reliance on information furnished Diners by plaintiffs. In accordance with paragraph 10.2(c), plaintiffs, in their April 16, 1969 request for registration, specifically offered to provide the indemnity (P. Exh. 27). However, defendants did not raise the whole indemnification question until August 1969 (D. Exh. SSS, TTT, VVV). Thus, as with the question of the reimbursement of expenses, the jury could reasonably have concluded that defendants utilized the indemnification requirement as a means of delaying the filing of the registration statement.

It was plaintiffs' expert witness' opinion that Diners should have filed the registration statement on or about June 20, 1969 and that Diners, by not filing the registration statement by June 20, 1969, was in breach of the Agreement. Mr. Friedman did not alter his opinion despite the fact that the indemnity question was not resolved until late August. Mr. Friedman stated:

"Q. Is it your testimony that Diners was required to file a registration statement without an indemnity from Mr.

Marx?

"A. The question that you are asking me is whether Diners had legally sufficient reason to refrain from fulfilling its obligation, and as I previously stated I think it should have had fulfilled its obligation by June 20, and I cannot understand why these questions got raised at these later dates." (Tr. Friedman 1779-80)

Mr. Friedman further testified that it is his practice to advise his clients to file a registration statement without an indemnity -- the indemnity would then be obtained prior to the effective date of the registration statement (Tr. Friedman 1781).

As to defendants' other "performance possibilities," the evidence introduced at trial established that Diners' obligation to carry through with the registration process continued even though Diners and plaintiffs were exploring alternatives to registration. Mr. Friedman testified:

"Q. Would the fact that sometime between April 16, 1969 and August 28, 1969 the parties, both the Diners' Club and the person who made the demand are exploring possible alternatives to the demand, would that affect your opinion as to whether or not Diners' Club in this case used their best efforts to promptly file this registration statement?

"A. No, because Diners' Club should

have begun immediately when they received the request to do that which should be done; therefore, I don't see that it excuses performance.

"Q. Does the fact that the person who made the demand was discussing with Diners' Club a possible alternative to registration in your view affect the Diners' obligation to promptly file?

"A. No. In my judgment the fact that he was exploring alternatives does not constitute a waiver of his right to have Diners' Club go forward." (Tr. Friedman 1738-39)

Defendants argue that plaintiffs were required to use "good faith" efforts to find an alternative to registration (Defendants' memorandum, pp. 20-21, 30-31). Nowhere in the contract is such a duty imposed on the plaintiffs. The applicable provision in Paragraph 10.2(b) states:

"Unless Diners shall have received an opinion from its counsel that registration is not required, or if Diners and all such registered holders, together proceeding expeditiously and in good faith after such notice, cannot obtain from the Securities and Exchange Commission a 'no-action' letter with respect to the sale of such shaes, then Diners shall promptly file a registration statement and use its best efforts to cause such registration statement to become effective."

Obviously, only Diners could secure an opinion letter from its counsel that registration was not required. No

evidence was produced at trial that Diners ever sought a "no-action" letter from the SEC, nor was there ever a showing that plaintiffs in any way hindered Diners' efforts.

Reasonable minds could have differed as to whether Diners should have filed the registration statement by June 20, 1969 and brought about effective registration by the end of August 1969. However, plaintiffs introduced substantial evidence to support their claim that Diners breached its contractual obligations -- that Diners should have filed the registration statement by June 20, 1969, and that the registration statement should have become effective by the end of August 1969. Similarly, substantial evidence was presented to the jury which could reasonably lead it to reject defendants' "conditions precedent" and "other performance possibilities" arguments.

As was stated by the Fifth Circuit in Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969), "if there is substantial evidence opposed to [a motion for judgment notwithstanding the verdict from which] reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, then the motion should be denied." Viewing the evidence and testimony in a light most favorable to the plaintiffs and allowing the jury the opportunity to draw every reasonable inference from

that evidence to support the verdict, the Court must conclude that substantial evidence had been presented to the jury, and from which reasonable men could have returned a verdict for the plaintiffs.

POINT II

SINCE THE OVERWHELMING WEIGHT OF THE EVIDENCE SUPPORTED THE JURY'S VERDICT, DEFENDANTS' DEMAND FOR A NEW TRIAL SHOULD BE DENIED.

In order for the Court to grant a new trial, it must find that the jury's verdict was "against the clear weight of the evidence or whether for any reason it would be a miscarriage of justice if the verdict were allowed to stand". Saposnick v. Maciorkowski, 207 F. Supp. 457, 459 (S.D.N.Y. 1962); see Lewin v. Metropolitan Life Insurance Co., 394 F.2d 608 (3d Cir. 1968); Creagh v. United Fruit Co., 178 F. Supp. 301 (S.D.N.Y. 1959); Wade v. Lane, 189 F. Supp. 661 (D.D.C. 1960), aff'd, 290 F.2d 387 (D.C. Cir. 1961). As previously discussed, there was sufficient evidence presented to the jury to support its verdict that Diners failed to promptly file a registration statement and use its best efforts to cause the registration statement to become effective. Diners' response to plaintiffs' request for registration is exemplified by Harold Johnson's remark on April 24, 1969, "my reaction is to do nothing" (P. Exh. 29). Diners' delay caused it to be in breach by June 20, 1969. Diners' further failure to use its best efforts to cause the registration statement to become effective also violated its obligation under the Agreement. The evidence

clearly supports a jury finding that Diners failed to face up to its contractual obligations with respect to the registration statement.

Defendants further argue that their motion for a new trial should be granted because certain prejudicial errors were committed during the course of trial. Defendants assign as error the Court's ruling permitting Stanley Friedman to testify as an expert witness for plaintiffs on the ground that defendants were deprived of an adequate opportunity to prepare for his testimony. Defendants contend that they did not become aware that plaintiffs were going to call Mr. Friedman as an expert witness until May 16, 1975, in the midst of defendants' case-in-chief. As is set forth in the affidavit of Barry I. Fredericks, sworn to the 27th day of June 1975, defendants' counsel were informed on May 1 and 2, 1975, prior to trial, that plaintiffs were considering calling an expert witness on the registration issue. At that time, defendants' counsel stated that they would have no objection to the calling of an expert witness. Moreover, defendants were fully apprised of the form that plaintiffs' third claim would take in plaintiffs' trial memorandum, which was served on defendants and handed up to the Court on May 6, 1975,

the day the trial commenced. Finally, plaintiffs did not decide to call Mr. Friedman until May 16. 1975, after defendants had prsented much of their evidence on their breach of contract claim.

In any event, the admissibility of expert testimony is solely within the discretion of the trial judge and the admission of Mr. Friedman's testimony was not an abuse of that discretion. See United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973). Mr. Friedman was a proper rebuttal witness in that he was called to rebut defendants' contentions that they promptly filed the registration statement and that they used their best efforts to cause the registration statement to become effective.

At the time that Mr. Friedman was called to testify, defendants did not plead surprise, nor did they request the Court for leave to call their own expert witness to rebut Mr. Friedman's testimony. The defendants only raised the issue of surprise after the jury returned its verdict in plaintiffs' favor. Defendants claim that they did not have sufficient time to prepare for the cross-examination of Mr. Friedman. Accepting for the moment defendants' contention that they learned that Mr. Friedman would be called on May 16, 1975, this still gave them a

week to prepare, since Mr. Friedman was called to testify on May 23. Moreover, at the conclusion of Mr. Friedman's direct examination, defendants did not request an adjournment to prepare for their cross-examination. Significantly, defendants' alleged unprepared cross-examination consumed several hours of trial time and forty-eight pages of trial transcript.

Finally, the Court cautioned the jury on the weight to be given Mr. Friedman's testimony. The Court stated:

> "Ladies and gentlemen, that means that this witness can be asked his opinion. You are to give his opinion such weight as you deem appropriate. That may be a great deal of weight, it may be moderate weight, it may be little weight, or no weight at all." (Tr. 1726)

Clearly, with such instructions, prejudicial error could not have been committed. See Katz v. Delaware & H.R. Corp., 38 F. Supp. 698 (M.D. Pa. 1941).

Defendants further assign as prejudicial error sufficient to warrant the granting of their motion for a new trial Mr. Friedman's testimony, as to the time within which the registration statement should have become effective, on the ground that Mr. Friedman's testimony was speculative and conjectural. Defendants under new cloth are again making their conditions precedent and "other

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performance possibilities" arguments. Defendants argue that Mr. Friedman's testimony could not have been based on the facts since Mr. Friedman rejected defendants' construction of the facts. Such an argument is simply absurd. Mr. Friedman did review the documents relating to the questions of the reimbursement of expenses, indemnification and the alternatives to registration, but, as he testified, it was not his view that these matters relieved Diners of its obligation to commence the registration process upon receipt of plaintiffs' request for registration and to continue the registration through the effective date. Mr. Friedman in fact testified that he spent ten to fifteen hours reviewing the documents (Tr. Friedman 1757).

Defendants further claim that Mr. Friedman's testimony was inadmissible since he allegedly relied solely on the seventy day figure contained in the SEC 1970 Annual Report, which was the median time in that year between the filing of a registration statement and its effective date. Mr. Friedman did not rely solely on the SEC figure, but drew on his experience in the securities field. In fact, it was Mr. Friedman's view that seventy days was "rather generous" to Diners and that the registration should have become effective even

prior to August 28, 1969 (Tr. Friedman 1793). Mr. Friedman based that opinion on the fact that Diners was a reporting company, so that much of the information required for the registration statement was already prepared for 10-K's and proxy statements (Tr. Friedman 1732-35).

Diners also asserts that Mr. Friedman exceeded the scope of his expertise by interpreting the provisions of the acquisition agreement. The record clearly establishes that Mr. Friedman was questioned on matters of contract interpretation on cross-examintion by defendants; plaintiffs sought his expertise only in the field of securities regulation (Tr. Friedman 1760-68). The defendants should not now be allowed to cite this portion of the expert's testimony as prejudicial error since they themselves opened up this area of examination. It would be unfair to now hold the plaintiffs responsible for enlarging the scope of Mr. Friedman's testimony when in fact the defendants caused any expansion that may have occurred.

Defendants claim that the Court committed prejudicial error by taking judicial notice of the SEC's median time between filing and the effective date in 1970. Defendants contend that the jury understood the seventy day figure to be the authoritative standard. Defendants, how-

ever, overlook the Court's careful charge on the seventy day figure. The Court in its charge to the jury stated:

> "Plaintiffs contend that if Diners' had used its best efforts to cause the registration statement to become effective, the registration statement would have become effective approximately 70 days from its filing. The Court has taken judicial notice of the 36th Annual Report of the Securities and Exchange Commission which states that the average time between filing of a registration statement and the effective date during the fiscal year ended June 30, 1970 was 70 days. The taking of judicial notice by the Court of a fact is a finding that said fact is not subject to any reasonable dispute. However, whether or not the Diners' registration statement would have become effective within the average time, that is, 70 days, is a question for you to determine from all of the evidence in this case." (Tr. 1960).

Defendants did not object to this charge and pursuant to Rule 51 of the Federal Rules of Civil Procedure, they do not have standing to object at this late date. Moreover, as was stated above, it was Mr. Friedman's testimony that the seventy day figure was rather generous (Tr. Friedman 1793).

Defendants contend that Mr. Friedman's testimony was prejudicial because he was not a proper rebuttal witness. They argue that Mr. Friedman was not called to explain away testimony introduced during defendants' case-in-chief. In point of fact, plaintiffs decided to call Mr. Friedman as a rebuttal witness during the defendants'

presentation of their case-in-chief, as a result of the introduction of testimony and documentary evidence on the registration issue. Defendants sought to prove as part of their case-in-chief that the reimbursement, indemnification, and alternatives to registration issues relieved Diners of its obligation to proceed with registration. It was necessary to call Mr. Friedman in order to refute that contention of plaintiffs. The Court was properly using its discretionary power in permitting the plaintiffs to present an expert witness on rebuttal. Smith v. Pittsburgh Cage & Supply Co., 323 F. Supp. 256 (W.D. Pa. 1971), aff'd, 464 F.2d 870 (3d Cir. 1972); Skogen v. Dow Chemical Co., 375 F.2d 692, 705 (8th Cir. 1967); Casey v. Sea Shipping Co., 178 F.2d 360 (2d Cir. 1949); Sequin v. Berg, 260 App. Div. 284, 21 N.Y.S.2d 291 (3d Dep't 1940).*

Mr. Friedman was called as a witness at trial to opine whether, in light of the facts and documents introduced by both plaintiffs and defendants, Diners had

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* Diners cites F. W. Woolworth Co. v. Contemporary Arts, Inc., 193 F.2d 162 (1st Cir. 1951), aff'd, 344 U.S. 228 (1952), for the proposition that Mr. Friedman was an improper rebuttal witness. The case is distinguishable on the legal issue presented for decision. The F. W. Woolworth Co. case deals with the range of testimony offered in rejoinder, or surrebuttal, i.e., testimony offered to rebut the evidence introduced on rebuttal. In the case at bar, the rebuttal testimony was offered to rebut the defendants' case-in-chief.

properly filed a registration statement and used its best efforts to cause the registration to become effective. After being qualified as an expert in the field of securities regulation, Mr. Friedman testified that, in his opinion, Diners should have filed the registration statement by June 20, 1969 and should have caused effective registration by the end of August 1969.

Qualified as an expert in the field of securities regulation, the scope of his testimony was controlled by the Federal Rules of Evidence utilized during the trial. As to the form of testimony offered by an expert the Advisory Committee Notes to Rule 702* provide that:

> "[t]he use of opinions is not abolished by the rule, however. It will continue to be permissible for the expert to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts.

The basis of opinion testimony by the expert is controlled by Rule 703, which provides:

> "The facts or data in the particular case upon which an expert bases an opinion or

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* "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702.

> inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

The Court properly instructed the jury throughout Mr. Friedman's testimony that he was testifying as to his opinion of what a corporation in Diners' situation should have done in order to register the plaintiffs' shares. The Court stated:

> "He is giving his opinion.... It is his idea based on what he believes to be the situation as it existed. That's his opinion. The jury can accept it, they can reject it." (Tr. 1736)

Viewing the expert testimony in light of the Federal Rules of Evidence, Mr. Friedman's testimony was proper since as a qualified expert he was permitted to suggest the inference which should be drawn from his knowledge of the facts and his expertise in securities regulation. When asked his opinion on the ultimate fact issues,* Mr. Friedman suggested that from the facts available to him, he concluded that Diners should have registered by June 20, 1969 and effected registration by late August 1969.

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* "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704.

Thus, Mr. Friedman was both a proper expert witness and a proper rebuttal witness. Defendants' contention that the admission of Mr. Friedman's testimon, was prejudicial error is unfounded.

Defendants also seek a new trial on the ground that the jury made an erroneous determination on the question of damages. Defendants argue that the evidence does not support plaintiffs' contention that the registration statement should have become effective by late August 1969. Although defendants attempt to pass this contention off as a new argument, it is in reality a restatement of defendants' argument that Mr. Friedman's testimony was speculative and conjectural. Mr. Friedman was properly qualified at trial as an expert and gave his opinion, based on his knowledge and experience in securities regulation that Diners should have filed by late August 1969. It was also Mr. Friedman's view that Diners could have filed the registration statement even earlier.

In Republic Technology Fund, Inc. v. Lionel Corp., 483 F.2d 540 (2d Cir. 1973), cert. denied, 415 U.S. 918 (1974), the Second Circuit took cognizance of expert testimony at trial to the effect that six to eight weeks was all that should have been necessary to effectuate the reg-

istration statement.* In both Republic Technology and the instant case, the expert rendered his opinion regarding the amount of time necessary to bring about registration based on the fact that the corporate defendant was a reporting company, required to file much of the information required in the registration statement in other SEC filings.

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* The expert referred to in that Second Circuit decision was Mr. Friedman, plaintiffs' expert witness in this case (Tr. Friedman 1725).

POINT III

SINCE PLAINTIFFS DID NOT RETAIN AN INTEREST IN TRAVELCO AFTER THE ACQUISITION OF FUGAZY TRAVEL BUREAU BY DINERS, DEFENDANTS' MOTION FOR JUDGMENT N.O.V. OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON DEFENDANTS' COUNTERCLAIMS MUST BE DENIED.

A. It is clear from the evidence that plaintiffs fully divested themselves of their interest in Travelco.

More than substantial evidence was presented to the jury from which it could reasonably find, in accordance with the Court's instructions, that the plaintiffs had divested themselves of any interest they might have had in Travelco prior to Diners' acquisition of Fugazy Travel Bureau.

The Court specifically charged the jury on the Travelco transaction:

> "If you find that the plaintiffs maintained a direct or indirect interest in the franchise at 342 Madison Avenue during the time that they were officers and/or directors of Diners, or any of its subsidiaries..., you may return a verdict for the defendants against the plaintiff who you find to have breached his fiduciary duties on this claim." (Tr. 1973)

Defendants made no objection to this charge. By returning a verdict in favor of the plaintiffs on this issue, the jury clearly found on the basis of all the evidence pre-

sented that plaintiffs did not retain an interest in the 342 Madison Avenue office after the purchase agreement. There is sound support for this finding in the evidence and testimony presented at trial.

William Fugazy testified that he no longer owned an interest in Travelco as of October 30, 1967 (Tr. 1551). Similarly, affidavits executed on October 30, 1967 by Otto Marx, William Fugazy and Louis Fugazy stated that they had divested themselves of any interest, direct or indirect, in Travelco (D. Exh. EEE). Otto Marx and John Summerlin never had any interest, direct or indirect, in Travelco (Tr. W. Fugazy 1520).

Defendants contend that the indemnity agreement between plaintiffs and Irwin Fruchtman, Travelco's sole shareholder, constituted an ownership interest in Travelco by plaintiffs; the evidence does not support defendants' position. On August 1, 1967, William and Louis Fugazy and Irwin Fruchtman entered into an indemnity agreement whereby William and Louis Fugazy agreed to indemnify Mr. Fruchtman on the Franklin National Bank loan to Travelco, which Fruchtman had guaranteed. The purpose of the indemnity, executed prior to divestment, was to reassure Mr. Fruchtman, a novice in the travel field, that the loan to Franklin National Bank would be repaid. The loan, in fact, was paid

off in six or seven months (Tr. W. Fugazy 1528). All the plaintiffs eventually joined in this indemnity, not for any benefit or interest they could gain but, as Mr. Marx testified, in order to share the responsibility assumed initially by only William and Louis Fugazy (Tr. Marx 1468).

Contained in the August 1, 1967 Agreement between the Fugazys and Fruchtman is an option provision stating that once the loan to Franklin National Bank was repaid, William and Louis Fugazy could, if they chose, acquire a percentage of the shares of Travelco. Paragraph 4 of the August 1, 1967 agreement states:

> "At such time as the Corporation's loan of $99,000.00 has been repaid in full to the Franklin National Bank, William and Louis shall have the option, exercisable upon written notice to Fruchtman, to purchase from Fruchtman for a total consideration of $1.00, such number of shares of the Corporation owned by Fruchtman so that upon completion of the purchase William and Louis will each own thirty per cent (30%) of the outstanding stock of the Corporation and Fruchtman will own forty per cent (40%) thereof." (D. Exh. FFF) (Emphasis added)

Defendants would like to persuade the Court that this option also constituted an ownership interest in Travelco on the part of plaintiffs. Defendants ignore that the jury, based on the uncontroverted testimony and affidavits of William and Louis Fugazy (D. Exh. EEE), could have determined that plaintiffs William and Louis Fugazy divested themselves of the

option on or prior to October 30, 1967. In any event, defendants failed to produce any evidence that William or Louis Fugazy exercised this option to purchase.

Thus, from the evidence presented, the jury could reasonably find that the plaintiffs fully divested themselves of any interest in Travelco in accordance with the Agreement. No evidence was presented by the defendants to the contrary. Accordingly, defendants' motions for judgment notwithstanding the verdict and a new trial should be denied since the defendants failed to meet the standards applicable to both motions.

CONCLUSION

Based on the foregoing, it is respectfully submitted that defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial should be denied.

August 11, 1975

Respectfully submitted,

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Of Counsel

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REPLY AFFIDAVIT OF JOSEPH J. SANTORA

Aug 19, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARX & CO., INC., et al.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants.

Consolidated
Case
70 Civ. 3064

72 Civ. 4324 (RJW)

REPLY AFFIDAVIT

-against-

WILLIAM D. FUGAZY, et ano.,

Third-Party
Defendants.

----------x

WILLIAM D. FUGAZY, et ano.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

-against-

MARX & CO., INC., et al.,

Additional
Defendants on
the Counterclaims.

----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH J. SANTORA, being duly sworn, deposes and says:

1. Deponent submits this affidavit and the accompanying

memorandum of law in reply to the opposing affidavit of Barry I. Fredericks, Esq., sworn to on August 11, 1975, the additional affidavit of Mr. Fredericks sworn to on June 27, 1975, and plaintiffs' opposing memorandum dated August 11, 1975, and are further submitted in support of defendants' motion for judgment notwithstanding the verdict and a new trial in the above-captioned action as set forth in defendants' notice of motion dated June 26, 1975 and moving affidavit of even date, and in support of defendants' application set forth in deponent's supplemental affidavit sworn to on June 26, 1975.

2. To avoid unnecessary repetition, deponent will, whenever possible, refer and respectfully direct the Court's attention to defendants' moving papers, which contain a full exposition of the facts and authorities establishing that defendants should be granted judgment notwithstanding the verdict and a new trial with respect to plaintiffs' contract claim and defendants' counterclaims.

3. Plaintiffs, in their opposing papers, leave uncontroverted facts and authorities sufficient to compel the granting of defendants' motion. The only authorities offered by plaintiffs are inapposite decisions standing for propositions not here in dispute, and the only matters disputed by plaintiffs involve facts irrelevant to the issues at bar. Thus, the discussion herein and in defendants' reply memorandum illustrates that, on the undisputed facts and uncontested authorities of

record before the Court, the instant motion should be granted in all respects.

PLAINTIFFS' CONTRACT CLAIM

The Verdict

4. In awarding plaintiffs $533,000 on their contract claim, the jury necessarily found that the registration statement in suit should have become effective in late August, 1969, since the measure of damages was the closing price of Diners' stock in late August, 1969. *(Ex. 48) This is the only possible basis on which the award of damages can be explained. Subsequent to August, 1969, the price of Diners' stock steadily declined, reaching, in December, 1969, prices equal to and lower than the price plaintiffs eventually received in the tender offer. (Ex. 48) These facts are not in dispute.

The Obligation To File The Registration Statement Arose, As A Matter Of Law, No Earlier Than August 27, 1969 When The Parties Entered An Accord. The Jury's Verdict That The Registration Statement Should Have Become Effective At Or Before That Time Disregarded The Accord, Constituted Erroneous Determinations Of Questions Of Law, And Must Be Set Aside.

5. The parties entered into an accord on August 26

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*References herein to "Ex.", "Tr.", "Mov. Aff.", "Mov. Br.", "Opp. Aff." and "Opp. Br." signify references to trial exhibits, trial testimony, defendants' moving affidavit and brief, and plaintiffs' opposing affidavit and brief, respectively.

and August 27, 1969, replacing the original obligations relating to the filing of the registration statement. (Mov. Aff., par. 42-43) Plaintiffs do not contest this. (Opp. Aff., par. 29; Opp. Br., p. 15-19) The accord comprised (1) plaintiffs' promise to personally guarantee one-half the expenses of the registration statement in consideration for Diners' agreement that plaintiffs need not make the advance payment of estimated registration expenses required by section 10.2(b) of the acquisition agreement as a condition precedent to Diners' obligation to file a registration statement (Mov. Aff., par. 28, 42; Ex. WWW), and (2) plaintiffs' delivery of the indemnity required by section 10.2(c) of that agreement as a condition precedent to Diners' obligation to file a registration statement. (Mov. Aff., par. 28, 43; Ex. IIII) Plaintiffs, in the guarantee document, expressly conceded that Diners had been under no obligation to file until plaintiffs tendered the advance payment. (Ex. WWW) The record is clear that plaintiffs always acknowledged this (Ex. 27) and were even reminded of their obligation by Diners a month and a half before they entered into the accord. (Ex. PPP; Mov. Aff., par. 38-42)

6. The controlling statutory and judicial authorities establish that the accord between the parties bars plaintiffs from claiming, as they seek to do in this action, under the original and superseded obligation. (Mov. Br., p. 13-15) Plaintiffs cite no authorities on this point and do not contest this well established principle of law. Diners completely

executed its obligation under the accord by immediately filing the registration statement on August 28, 1969. (Mov. Aff., par. 43; Ex. 30) Thus, even if it were assumed, arguendo, that an obligation to file the registration statement arose prior to August 27 and that Diners had breached that obligation, plaintiffs would nevertheless be barred by the accord, as a matter of law, from any claim relating to such alleged prior breach. (Mov. Br., p. 13-15)

7. Thus, the earliest date by which Diners properly could be found to have been required to file is August 28, 1969. The filing of the registration statement on August 28 clearly satisfied Diners' obligation under the accord. Therefore, the jury's verdict that the registration statement should have become effective in late August, 1969 is manifestly absurd, is erroneous in fact and law, and must be set aside.

8. There are no disputed facts with respect to the existence or the terms of the accord. Neither the existence nor the legal consequences of the accord were proper questions for jury deliberation. The jury had no leeway to determine whether the accord should be honored or disregarded, or to pass upon its legal consequences. Yet, in rendering a verdict based on the registration statement becoming effective in August, 1969, the jury established a new legal doctrine that an accord is without consequence and a party thereto may freely claim under

the underlying obligation, in direct conflict with the controlling judicial and statutory authorities. (Mov. Br., p. 13-14) This erroneous determination of law requires that the verdict be set aside. (Mov. Br., p. 9-10)

9. There is no dispute that after the filing of the registration statement, Diners had to wait for the comments of the S.E.C. and could do nothing further until receipt of those comments. There is no dispute that the S.E.C.'s financial comments, the principal questions to be resolved, were not received until October 31, 1969. (Mov. Aff., par. 45) There is no dispute that following receipt of the S.E.C. comments, Diners immediately engaged in extensive activity to respond to the S.E.C. (Mov. Aff., par. 45-46) Mr. Fugazy admitted these efforts by Diners were sincere attempts to respond to the S.E.C. (Mov. Aff., par. 20-22) In any event, this Court, per Judge Levet, has held that it would take a minimum of six weeks to prepare an amendment to comments of the S.E.C. and a minimum of six additional weeks for the S.E.C. to review the amendment and declare it effective. (Mov. Br., p. 43-44) The registration statement in this case could thus not possibly have become effective under any circumstances until the end of January, 1970. The tender offer was made on February 6, 1970, at a price higher than plaintiffs could have received for their stock in January, 1970. Thus, the jury's verdict that the registration statement should have become effective in late August, 1969 and that the failure to become effective at that time damaged plaintiffs in the amount of $533,000, must be set aside.

It Is Undisputed That Plaintiffs Failed To Make Advance Payment Of Estimated Registration Expenses And Deliver An Indemnity By August 27, 1969 As Conditions Precedent To Diners' Obligation To File. The Jury's Verdict That The Registration Statement Shou'd Have Become Effective At Or Before That Time Disregarded The Non-Performance Of The Conditions Precedent, Constituted Erroneous Determinations Of Law, And Must Be Set Aside.

10. The acquisition agreement specifically conditions Diners' obligation to file on plaintiffs' making advance payment of one-half the estimated expenses of the registration statement, and on plaintiffs' delivering to Diners an indemnity. (Mov. Aff., par. 28-29) Plaintiffs acknowledged and admitted in writing the existence of those conditions in April, 1969 when they requested registration (Ex. 27) and when they entered the accord in August, 1969 wherein they substituted new obligations therefor. (Ex. WWW) In their opposing papers, plaintiffs' counsel further acknowledged these conditions. (Opp. Br., p. 15-19)

11. The pertinent authorities conclusively establish that Diners' obligation to file the registration statement did not come into existence until the performance of those conditions by plaintiffs. (Mov. Br., p. 11-13) Plaintiffs cite no authorities on this point and do not contest this well established principle of law.

12. The parties agree that plaintiffs never performed

those conditions and that the accord whereby plaintiffs substituted new obligations for their obligation to perform those conditions was not consummated until August 27, 1969. Thus, prior to August 28, 1969, Diners had no obligation to file the registration statement under the undisputed facts and authorities herein, and the filing on August 28 was proper and timely. The jury's verdict that the registration statement should have become effective at that time and that the failure to become effective at that time damaged plaintiffs in the amount of $533,000 is manifestly absurd, is erroneous in fact and in law, and must be set aside. (See. par. 9 above)

13. Neither the existence nor the legal effect of these undisputed conditions precedent and plaintiffs' undisputed failure to perform them by August 27 were proper questions for jury deliberation. Neither issue involved the determination of any question of fact, but merely required the application of well established law to undisputed facts of record. Thus, in determining that Diners was required to cause the registration statement to become effective in August, 1969, the jury was announcing a new "legal principle" that conditions precedent to an obligation do not have to be performed to bring the obligation into existence. That "principle" is in direct conflict with the controlling judicial authorities. (Mov. Br., p. 11-12) Where the jury has erroneously determined the law, as this jury has done, its verdict must be set aside. (Mov. Br., p. 9-10)

It Is Undisputed That The Parties Were Pursuing Alternatives To Registration As Compelled By The Acquisition Agreement And That Such Activity Continued At Least Until August, 1969. The Jury's Verdict That The Registration Statement Should Have Become Effective At Or Before That Time Disregarded That Requirement, Constituted Erroneous Determinations Of Questions Of Law, And Must Be Set Aside.

14. The acquisition agreement specifically required Diners and all registered holders seeking registration to pursue alternatives to registration. (Mov. Aff., par. 26, 29) In addition to plaintiffs, 18 other registered holders were added to the registration statement pursuant to the agreement subsequent to July 19, 1969. (Mov. Aff., par. 27, 37) The agreement specifically provided that Diners' obligation to file arose only after the parties "together proceeding ---- in good faith" cannot obtain a no-action letter from the S.E.C. dispensing with the need for registration. (Mov. Aff., par. 26)

15. Thus, plaintiffs' assertion that the obligation to pursue alternatives was solely an obligation of Diners is clearly in conflict with the express language of the agreement. Plaintiffs employed this erroneous characterization of the contract language to attempt, at the trial as they do herein in their opposing papers, to imply Diners used the search for alternatives required by the agreement as some sort of "delaying tactic". However, the agreement required Diners and plaintiffs to seek alternatives to registration to try to obtain a no-action

letter. Thus, if Diners had proceeded immediately to file, without seeking such alternatives, and had billed plaintiffs for their share of the registration expenses, plaintiffs could have objected that the required alternatives had not been pursued, and that Diners had thereby violated the agreement.

16. The record shows conclusively that the parties were pursuing alternatives to registration as required by the agreement through July and into August, 1969. (Mov. Aff., par. 33-36) Since the obligation to file a registration statement first arose after such pursuit ended, the registration statement could not possibly have become effective in August, 1969 and the jury's verdict that it should have become effective in August, 1969 is manifestly absurd, is erroneous in fact and in law, and must be set aside. (See paragraph 9 above)

17. In disregarding the parties' undisputed pursuit of the alternatives required by the agreement, the jury was again making an erroneous determination of a question of law. The jury had no leeway to disregard the express and unambiguous language of the agreement and the undisputed facts of record and the verdict must therefore be set aside. (Mov. Br., p. 9-10)

18. Throughout the trial, plaintiffs sought to confuse the jury with erroneous interpretations of the acquisition agreement and innuendoes that Diners used the search for alternatives as a "delaying tactic" to try to "postpone" the filing of a registration statement.

19. Plaintiffs now use the same approach in their opposing papers in an obvious attempt to distract the Court from the real issues at bar. Thus, plaintiffs argue that the verdict must be sustained because the jury "might have inferred" (a) that Diners did not really wish to file and either "ignored" its obligation or "used" the alternatives as "a ruse", and (b) that Mr. Marx never "authorized" Diners to "postpone" the filing while the parties were seeking alternatives. Plaintiffs also suggest that because Mr. Friedman told the jury these matters were "no legal excuse" for failure to file by June 20, the jury was properly able to infer that the search for alternatives was irrelevant to evaluating when Diners' obligation to file arose. Finally, plaintiffs conclude their argument by asserting, without any support and in conflict with the express language of the agreement, that Diners' obligation to file arose and became absolute upon plaintiffs' request for registration and could not be modified in any way unless Diners (presumably acting alone) obtained a no-action letter. (Opp. Br., p. 21)

20. All the above considerations are totally irrelevant to the rights and obligations of the parties under the express language of the agreement. Neither Marx's motivation in requesting registration nor Diners' wishes upon receiving the request are at all relevant to when and whether an obligation arose under the agreement and was performed in accordance therewith. Thus, Diners did not have to employ "a ruse" to seek to have plaintiffs live up to their obligations under the agreement.

Nor did Diners need Marx's "authorization" to "postpone" Diners' obligation, which had not yet arisen. There can be no question that Mr. Friedman's opinions are totally incompetent to alter or qualify express contract language or undisputed principles of law. The fact that Mr. Friedman was actually willing, for example, to testify in open court that he advises clients to file without an indemnity may be relevant to his techniques of practicing law, but is irrelevant to the issues at bar, which must be determined by the language of the agreement and the established authorities in this jurisdiction. If plaintiffs are correct in suggesting that the irrelevant considerations they raised were relied on by the jury, plaintiffs simply highlight the fact that the verdict is improper and must be set aside.

Defendants Should Be
Granted A New Trial

21. The arguments concerning the weight of evidence have been fully set forth in the moving affidavit (par. 13-76) and will not be repeated herein. However, it is respectfully submitted that the evidence of record in this case, at the very least, so favors defendants on the contract claim that a new trial is warranted on that basis. (Mov. Br., p. 18-22)

22. Defendants also seek a new trial on the ground that Mr. Friedman was permitted to testify although he had not been listed in the pre-trial order, his potential appearance had been improperly concealed from defendants until the last moment,

and his appearance and testimony constituted unfair surprise of defendants. These matters are clearly established in the moving papers. (Mov. Aff., par. 77-87). Plaintiffs do not dispute that the first time Friedman was identified to defendants as a potential witness was May 16, after the close of plaintiffs' case and ten days after the trial began.

23. Plaintiffs' counsel represents that he told deponent on May 1 or May 2 that he was "considering" the "possibility" of calling "an expert witness" on plaintiffs' contract claim. Contrary to counsel's affidavit, deponent initiated the call specifically to ascertain which of the witnesses listed in the pre-trial order plaintiffs intended to call at the trial, in order to prepare for cross-examination. Mr. Fredericks advised deponent that the four plaintiffs would testify and that he was "considering" calling Mr. Hardee. No other potential witnesses were mentioned. Deponent recalls advising Mr. Fredericks he would not agree to Mr. Hardee's appearance, since he was not listed in the pre-trial order. Deponent also asked Mr. Fredericks what possible relevance Mr. Hardee's testimony could have, but did not receive a specific answer. The record of this case shows that Friedman had already agreed with Mr. Fredericks to testify on behalf of plaintiffs at the time of the above conversation.* Under those circumstances,

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*Friedman admitted on cross-examination on May 23, 1975 that he had agreed with Mr. Fredericks to testify before the trial commenced - at about the same time deponent had the above conversation with Mr. Fredericks.

"Q. When did you agree to testify in this case?
A. About three weeks ago. Q. Who contacted you? A. Mr. Fredericks." (Tr. 1754)

counsel's failure to disclose during that conversation his intention to call Friedman as a witness actually constituted an act of concealment.

24. Since Friedman had agreed to testify on May 1 or May 2, there was no excuse for counsel's concealment of that fact from defendants for two more weeks, except to achieve an unfair surprise. Plaintiffs are obviously quite uncomfortable about their conduct on this issue, as well they should be. Thus, they represent to the Court that they did not disclose Mr. Friedman's identity until May 16 because they had not decided to call Friedman until May 16. (Opp. Aff., par. 23-25, 31; Opp. Br., p. 26, 31) To the contrary, Friedman has admitted he agreed with Mr. Fredericks two weeks earlier to testify at the trial. Indeed, Mr. Fredericks' statement that he "formally" retained Friedman on May 16 (Opp. Aff., par. 25) is an indirect admission that he actually retained him to testify two weeks earlier, as Friedman admits.

25. In view of the above, it is incomprehensible that counsel can represent to this Court that he decided on May 16 to call Friedman as a witness. Counsel further represents that he decided to call Friedman on May 16 only after hearing the bulk of defendants' evidence on the contract claim and believing he needed Friedman to rebut the evidence defendants had introduced at the trial. (Opp. Aff., par. 25) However, by May 16, defendants had not introduced one shred of evidence on the contract claim.

26. Defendants' case commenced on May 15 and three witnesses appeared that day. Anthony Piscatella, never a Diners employee, Thomas Hays, who left Diners before plaintiffs requested registration, and Jules Asch, who testified only briefly about Continental financing of Diners in 1966-1968, did not testify at all that day on plaintiffs' contract claim. May 16 was not a trial day. Nothing happened in defendants' case on May 15 or May 16 to cause Mr. Fredericks to "decide" he needed the expert "to rebut defendants' evidence" on the contract claim.

27. On May 19, Mr. Asch answered a very few questions on the contract claim, primarily during Mr. Fredericks' cross-examination. Neither Mr. Johnson nor Mr. Herd on May 19 or Mr. Phillips on May 21 testified about the contract claim. May 20 was not a trial day. On May 22, Messrs. Marx and Fugazy were examined on the counterclaims. It was not until late in the afternoon of May 22 and on May 23, the last day of testimony, that defendants actually put in their case on the contract claim. Indeed, Mr. Faunce, whom plaintiffs' describe as "defendants' principal witness on ---- the contract claim" (Opp. Aff., par. 24), did not testify until May 23, immediately prior to Friedman's taking the stand.

28. The Court's attention is respectfully directed to plaintiffs' counsel's detailed sworn statement in paragraph 25 of the opposing affidavit, as follows:

"It became apparent to plaintiffs during the course of defendants' presentation of their defense to the breach of contract claim that it would be necessary for plaintiffs to present an expert witness in rebuttal to the attempt by defendants to make out defenses to the breach of contract claim.

* * *

I did not finally decide to call an expert witness until after I had had the opportunity to hear and weigh the testimony of defendants' witnesses and review the documents introduced by defendants. Mr. Friedman was not retained formally until May 16, 1975, however, after defendants had presented much of their evidence on their defense to the breach of contract claim." (emphasis added)

29. These sworn statements are repeated and confirmed in the opposing affidavit (par. 31) and in counsel's brief (p. 26, 30-31). The trial record clearly demonstrates that these statements are total misrepresentations. (See par. 26-27 above). Such statements can only be viewed as an imposition on the Court and the efficacy of these proceedings. In deponent's view, they are merely a continuation of the outrageous conduct of plaintiffs surrounding Friedman's appearance as a rebuttal witness at the trial.

30. Since counsel does not even bother to deny that he failed to disclose Friedman's prior testimony (although he had already discussed the transcript with Friedman), or that he withheld Friedman's article until 6:00 p.m. on May 22 (Mov. Aff., par. 84-85), it is clear that the whole Friedman episode was an improper "ambush" of defendants. Even counsel's

letter of May 16 (Opp. Aff., Ex. B) now reveals for the first time that counsel sent Friedman a "question and answer form" before he testified. Had we known of this form, defendants' counsel would have sought its production for use in cross-examination. The non-disclosure of that form gives rise to an additional basis for a new trial. In any event, it is clear that the entire Friedman episode was nothing less than a calculated attempt by plaintiffs to deprive defendants of their rights to discovery and to have an adequate opportunity to prepare for cross-examination under the Federal Rules of Civil Procedure. (Mov. Br., p. 22-27)

31. Friedman was clearly an improper rebuttal witness, since he was used to create a new claim - "prompt filing by June 20" and not to rebut any of defendants' evidence on a "prompt filing" claim. If Friedman was an appropriate witness in this case, he could only have properly been called on plaintiffs' case-in-chief. Mr. Faunce and Mr. Asch had both been deposed by plaintiffs years before the trial. Every document counsel asserts Friedman was called to "rebut" was in plaintiffs' possession years before the trial. Indeed, Friedman admitted he was already reviewing them prior to the close of plaintiffs' case. (Mov. Aff., par. 83) One of plaintiffs' own authorities demonstrates the impropriety of so holding an expert "in reserve" at trial. (Opp. Br., p. 39 - See Defendants' accompanying reply memorandum, p. 11) Thus, plaintiffs' failure to call Friedman on their case-in-chief and

concealment of his appearance until the last moment were improper tactics which require a new trial. This is especially true since Friedman was obviously used to create the new "prompt filing claim", which had never before been at issue in this case, as an independent basis for recovery. (Mov. Aff., par. 11, 25)

32. An additional and separate ground for a new trial is set forth in the moving papers (Mov. Aff., par. 53-54, 56-57) since Friedman was permitted to give his interpretation of the unambiguous language of the agreement. Friedman disregarded the language of the agreement and concluded, without basis, that Diners had an unconditional and immediate obligation to file. This was a necessary predicate for his June 20 date. In their opposing papers, plaintiffs admit that Friedman so testified and concede the impropriety of such testimony. (Opp. Br., p. 29; Opp. Aff., par. 31) Plaintiffs' sole rejoinder is the assertion that defendants initially raised the issue on cross-examination and are thus estopped from complaining herein about such improper testimony. (Opp. Br., p. 29; Opp. Aff., par. 31)

33. This assertion of plaintiffs' counsel is particularly spurious. At almost the precise point in their brief where they argue that defendants "opened the door" to such questioning, plaintiffs' counsel admit they called Friedman specifically to interpret the agreement in their favor. (Opp. Br., p. 30-32)* This is repeated in the opposing affidavit

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*"Defendants sought to prove as part of their case-in-chief that the reimbursement, indemnification, and alternatives to (cont.)

(par. 25), and plaintiffs specifically demonstrate the inaccuracy of their argument by reciting Friedman's soliloquy on the interpretation of the agreement (Opp. Aff., par. 14). They elicited that soliloquy over defendants' objection (Tr. 1732) on direct examination. It is with singular ill grace that plaintiffs' counsel represent to this Court that defendants initiated the questioning of Mr. Friedman on the agreement.

34. Defendants also seek a new trial based on the separate grounds that the Court should not have taken judicial notice of the SEC "median" date of 70 days and further, that the Court permitted Friedman, over objection, to distort the SEC data to the jury and transform the "median" date into an absolute period within which the registration statement in suit should have become effective. (Mov. Aff., par. 60-61). These matters justify a new trial.

35. Based on the foregoing, it is respectfully submitted that the facts and authorities before the Court, as well as every principle of fairness and justice, require that defendants be granted a new trial on the contract claim and that plaintiffs not be permitted to retain the verdict

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[Footnote continued]

registration issues relieved Diners of its obligation to proceed with registration. It was necessary to call Mr. Friedman in order to refute that contention of plaintiffs [sic]." (Opp. Br. p. 31)

achieved in the manner described above.

The Application in Deponent's Supplemental Affidavit Should Be Granted

36. Plaintiffs' counsel agrees that defendants objected to the appearance of Mr. Friedman as a rebuttal witness not listed in the pre-trial order. (Fredericks Aff., sworn to June 27, 1975, par. 6) Accordingly, deponent respectfully requests that the Court cause the trial record to reflect defendants' objection or otherwise reflect defendants' objection as the Court deems appropriate.

DEFENDANTS' COUNTERCLAIMS

Plaintiffs' Admissions And Additional Undisputed Evidence Established Plaintiffs' Retention Of An Interest In Travelco In Clear Violation of The Express Language Of The Agreements In Suit. The Jury's Verdict To The Contrary Disregarded The Undisputed Facts, Constituted Erroneous Determinations Of Questions Of Law, And Must Be Set Aside.

37. The Court charged the jury that they should return a verdict for defendants on the counterclaims if they found that plaintiffs maintained "a direct or indirect interest" in Travelco (342 Madison Avenue) while they were officers and/or directors of Diners or any Diners subsidiaries. (Opp. Aff., par. 35) Plaintiffs agree that the jury's verdict implicitly contained the finding that plaintiffs did not maintain such an interest. (Opp. Aff., par. 35).

38. Defendants' moving affidavit sets forth the undisputed evidence that plaintiffs did maintain such a direct or indirect interest in Travelco. (Mov. Aff., par. 10, 99-116) The authorities establish, as did the Court's jury instruction, that such an interest was a violation by plaintiffs of the agreement in suit. (Mov. Br., p. 47-49) In their reply papers, plaintiffs acknowledge and admit the existence of that prohibited interest in Travelco but seek, as they did with respect to their contract claim, to distract attention with irrelevant considerations.

39. For example, plaintiffs spend a good deal of time arguing that plaintiffs' admitted indemnity interest in Travelco is not an "ownership" interest. In so arguing, plaintiffs try to ignore the fact that defendants need not establish an ownership interest to prevail on the counterclaims but any "direct or indirect" interest. Furthermore, plaintiffs ignore other undisputed "direct or indirect" interests of plaintiffs in Travelco which do constitute ownership and direct participation in the affairs of Travelco prohibited by the agreements. Finally, plaintiffs' argument that they had no interest in Travelco precisely on October 30,1967 (the day they signed the affidavit to that effect), is irrelevant since the prohibition clearly ran throughout the period they were officers and/or directors of Diners or a Diners subsidiary, 1967-1970.

40. Faced with overwhelming evidence in the record establishing their interest in Travelco (Mov. Aff., p. 43-56), which included an affidavit which Diners required plaintiffs to execute on October 30, 1967 (Def. Ex. EEE), plaintiffs ironically in their opposing papers point to that very affidavit, and William Fugazy's testimony parroting it, as the only evidence in the record to support the jury's verdict on that issue (Fredericks Aff. p. 24). It is ironic because the plaintiffs themselves made admissions at the trial which established that their affidavit of October 30, 1967 was false.

41. The admissions of the plaintiffs and the undisputed evidence shows that they retained an interest in the 342 Madison Avenue branch in three different ways: (1) by agreeing to indemnify Mr. Fruchtman against a loan which he supposedly obtained to purchase his alleged ownership interest in Travelco (an indemnity arrangement which plaintiffs not only concede was made, but was not disclosed to Diners - Tr. 1470; Opp. Aff., p. 29, par. 43); (2) by the Fugazy brothers retaining a stock ownership interest in Travelco (Tr. 1530); and (3) the Fugazy brothers becoming officers and directors of Travelco, which "plaintiffs readily admitted at trial" (Opp. Aff. p. 25, par. 39).

42. With respect to the indemnification, plaintiffs argue that this did not constitute "an ownership interest". In the first place, it need not have constituted an "ownership

interest", since the agreements in question, and the charge to the jury, require only a "direct or indirect interest" (Tr. 1973; Pl. Ex. 5, pp. 26-26A, 30, 36, 40; Pl. Ex. 7, 34, 36, pp. 7-7A; Def. Ex. EEE; Pl. Ex. 22, p. 6). It is also noteworthy that the indemnity arrangement among all of the plaintiffs was proportionate to their equity interest in Fugazy Travel Bureau (Def. Ex. GGG, p. 5). It is clear that such an indemnity arrangement, undisclosed to Diners, was a direct or indirect interest, such that the jury should have found for defendants on their counterclaims.

43. With respect to the stock ownership of the Fugazys in Travelco, which opposing counsel did not choose to discuss in his affidavit, Mr. Fugazy admitted that once Mr. Fruchtman's alleged loan was repaid, he and his brother would become 60 percent shareholders of Travelco (Tr. 1530).* He also testified that the loan was repaid six or seven months after it was taken out in August of 1969 (Tr. 1528).** It is thus clear that he and his brother had a direct or indirect interest in Travelco, such that the jury should have returned a verdict in favor of defendants on the counterclaims. Even if the arrangement were that the Fugazys would become stockholders only upon the exercise of an option for $1.00, clearly that too was a direct or indirect interest.

---

*It is subject to serious question whether the Fugazys ever sold any of their interest in Travelco to Mr. Fruchtman, since Def. Ex. AAAA indicates that Mr. Fugazy put Mr. Fruchtman on the payroll at the 342 Madison branch (43rd Street) on November 21, 1967.

** This too is subject to question, in view of Def. Ex. CCCC, in which Mr. Fugazy assures Mr. Fruchtman that "we will have to work out something so that 43rd Street doesn't lose any money."

44. Lastly, while admitting that the Fugazy brothers remained officers and directors of Travelco after Fugazy Travel Bureau was acquired by Diners (Opp. Aff., p. 25, par. 39), plaintiffs somehow claim that because a management services contract dated June 19, 1967 between Travelco and Fugazy Travel Bureau was disclosed to Diners, the fact that the Fugazy brothers stayed on as officers and directors of Travelco is therefore not in violation of the agreements in question. The point is that it was the very existence of the Travelco management services agreement of June 1967 that led Diners to insist that plaintiffs divest themselves in October 1967 of all interest in Travelco, to avoid a conflict of interest, as Mr. Marx himself admitted (Tr. 1460). Thereafter, whether or not Travelco happened to have a management services contract with Fugazy Travel Bureau has nothing to do with the Fugazy brothers' relationship with Travelco.

45. At the trial and in their opposing papers, plaintiffs have failed to introduce any evidence or demonstrate why the jury should not have returned a verdict in favor of defendants on the counterclaims, at least on the issue of the retention by plaintiffs of an interest in Travelco. It is respectfully requested that judgment notwithstanding the verdict be entered in favor of defendants Diners and DWT and a new trial granted.

Defendants Should be Granted
A New Trial On The Counterclaims

46. It is respectfully submitted that the facts and

authorities set forth in defendants' moving and reply papers and the admissions in plaintiffs' opposing papers, which need not be repeated herein, demonstrate that the evidence on the counterclaims so favors defendants that a new trial should be granted on that basis.

WHEREFORE, deponent respectfully requests that defendants' instant motion for judgment notwithstanding the verdict and a new trial be granted in all respects, that defendants' instant application for clarification of the trial record be granted in all respects, and that defendants be granted such other and further relief as the Court deems just and proper.

JOSEPH J. SANTORA

Sworn to before me this
19th day of August, 1975

ROBERT B. McKAY
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Certificate filed in New York County
Commission expires March 30, 1977

ATTORNEY'S CERTIFICATION

STATE OF NEW YORK, COUNTY OF

The undersigned, an attorney admitted to practice in the State of New York, does hereby certify, pursuant to Section 2105 CPLR, that I have compared the within

with the original and have found it to be a true and complete copy thereof.
Dated: 19

.....
Type or Print Name Below Signature

NOTICE OF ENTRY OR SETTLEMENT
[Check and complete appropriate box and section]

A-402

Sir(s):

PLEASE TAKE NOTICE that a

of which the within is a (true) (certified) copy

☐ *NOTICE OF ENTRY*
was duly entered in the within named court on 19

☐ *NOTICE OF SETTLEMENT*
will be presented for settlement to the Hon.

one of the judges of the within named court at the Courthouse at

on 19
at *o'clock* *M.*
Dated: 19

Yours, etc.,

HARDEE BAROVICK KONECKY & BRAUN

Attorney(s) for

Office and Post Office Address

ONE DAK HAMMARSKJOLD PLAZA
NEW YORK, N. Y. 10017

To

Attorney(s) for

Consolidated Case
70 Civ. 3064
Index No. 72 Civ. 4324 *Year 19*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK & CO. INC., et al.

Plaintiffs,

-against-

THE DINERS' CLUB, INC. et al.

Defendants.

REPLY AFFIDAVIT

HARDEE BAROVICK KONECKY & BRAUN

Attorney(s) for

Office and Post Office Address

ONE DAK HAMMARSKJOLD PLAZA
NEW YORK, N. Y. 10017
(212) 754-1430

To

Attorney(s) for

ADMISSION OF SERVICE

The undersigned acknowledges receipt of a copy of the within Reply Affidavit
on Aug. 19, 197
at 3:15 *o'clock* P. *M.*

Harris Taedenstein
Attorney(s) for Plaintiffs
by: A. Tesi

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF

being sworn, say
I am not a party to this action; I am over 18 yea
of age; I reside at

On 19 *I serve*
the within
upon

the attorney(s) for *in th*
action, at

the address designated by said attorney(s) for th
purpose by depositing a true copy of same enclos
in a postpaid, properly addressed wrapper, in
official depositary under the exclusive care a
custody of the United States Postal Service with
the State of New York.

.....
Type or Print Name Below Signature

Sworn to before me
this *day of* 19

07200 003

A-403 (Opy) SEPT 23, 1975

OPINION OF JUDGE WARD

(41)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FILED SEP 23 1975 S.D. OF N.Y.

MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR.,

Plaintiffs, : OPINION

-against-

70 Civ. 3064

THE DINERS' CLUB, INC., DINERS'/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION, and THE CONTINENTAL INSURANCE COMPANY,

Defendants,

#43110

-against-

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Third-Party Defendants.

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs,

-against- 72 Civ. 4324

THE DINERS' CLUB, INC., DINERS'/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants,

MARX & CO., INC., OTTO MARX, JR., F.T. VENTURES, INC. and JOHN V. SUMMERLIN, JR.,

Additional Defendants on the Counterclaims.

HARRIS, FREDERICKS & KOROBKIN, ESQS.
1271 Avenue of the Americas
New York, New York 10019
Attorneys for Plaintiffs,

BARRY I. FREDERICKS, ESQ.
Of Counsel

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER, ESQS.
299 Park Avenue
New York, New York 10017
Attorneys for Plaintiffs,

JAMES E. TOLAN, ESQ.
Of Counsel

HARDEE, BAROVICK, KONECKY & BRAUN, ESQS.
One Dag Hammarskjold Plaza
New York, New York 10017
Attorneys for Defendants,

JOSEPH J. SANTORA, ESQ.
ROBERT B. KAY, ESQ.
ROBERT B. McKAY, ESQ.
Of Counsel

WARD, J.

Plaintiffs commenced these actions in 1970 and 1972, respectively, alleging, inter alia, that defendant The Diners' Club, Inc. ("Diners'") breached a contract to register certain unregistered Diners' stock held by them. In addition, plaintiffs asserted two claims alleging violations of §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)), and Rule 10b-5 promulgated thereunder. Defendants denied plaintiffs' allegations and asserted various counterclaims. Following a trial which began on May 6, 1975 and concluded on May 28, 1975, the jury returned a verdict for plaintiffs on their contract claim and on defendants' counterclaims, awarding a total of $533,000 in damages on the former. The Court dismissed one of the plaintiffs' §10(b) claims at the end of their case and the jury returned a verdict for defendants on the other §10(b) claim.

Diners' moves pursuant to Rules 50 and 59, Fed. R. Civ. P., for judgment notwithstanding the verdict on plaintiffs' contract claim or, in the alternative, for a new trial or remittitur. In addition, defendants Diners' and Diners' World Travel, Inc., formerly known as Diners'/Fugazy Travel, Inc. ("DWT") move for judgment notwithstanding the verdict and a new trial with respect to their counterclaims.

Defendants base their motion for judgment notwithstanding the verdict on the grounds that plaintiffs failed to produce sufficient evidence to meet their burden of proof; that the verdict of the jury necessarily involved an erroneous determination of law; and that the evidence was overwhelmingly in their favor. A new trial is sought on the grounds that the verdict is contrary to the weight of the evidence; and that the Court made prejudicial errors in its rulings during trial, principally in permitting Stanley Friedman, a witness not identified in the pre-trial order, to testify as a rebuttal witness. A new trial or remittitur is sought on the ground that the jury made an erroneous determination of plaintiffs' damages. For the reasons set forth below, the motions are in all respects denied.

The facts, briefly, are these. Under an agreement dated October 10, 1967, Diners' acquired the assets of Fugazy Travel Bureau for unregistered Diners' stock and other consideration. Paragraph 10.2(b) of the agreement provided that Diners', upon receipt of notification from plaintiffs that they desired registration, would promptly file a registration statement for the unregistered Diners' stock held by plaintiffs and would use its best efforts to cause the registration statement to become effective.[1]

On April 16, 1969, plaintiffs wrote a letter requesting Diners' to file a registration statement with respect to

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their Diners' stock. Instead of directing the preparation of a registration statement, George Faunce, then president of Diners', forwarded a copy of plaintiffs' letter containing the following notation to Harold Johnson, one of its directors, and executive vice president of The Continental Insurance Company ("Continental") which held a controlling interest in Diners':

> "Harold -- Alfred [Bloomingdale, Diners' board chairman] asked me to send this to you and [Victor] Herd [Continental's board chairman]. He wants to know your position - -
>
> George"

A letter dated April 24, 1969 from Johnson to Herd enclosing a copy of the April 16, 1969 request contained the following statement:

> "The attached letter, I believe, is an effort on the part of Otto Marx, Jr. to have Continental purchase his shares.
>
> "To my way of thinking <u>there is nothing that needs to be done at the present time</u>. Mr. Bloomingdale may discuss this at a later date but <u>my reaction is to do nothing.</u>"
> (emphasis added)

Although Diners' was requested to file a registration statement in mid-April, 1969, it is undisputed that Diners' did nothing to register the stock until late July, 1969, more than three months after receiving the letter requesting registration

and almost two months after its financial statement for the fiscal year ended March 31, 1969 became available. From the foregoing, the jury could reasonably infer that Diners', with the urging and approval of Herd and Johnson, decided to do nothing and thereby avoid its obligations under paragraph 10.2(b) of the agreement.

It is clear that the motion for judgment notwithstanding the verdict on the grounds that it is against the weight of the evidence and that the verdict of the jury nedessarily involved an erroneous determination of law must be denied. The standard on such a motion is the same as the standard for a directed verdict, that is, whether there was evidence from which the jury could have properly found for plaintiff, against whom the motion is made, viewing the evidence most favorable to him and giving him the benefit of all reasonable inferences. 9 Wright and Miller, Federal Practice and Procedure §2524 (1971); Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970). Viewed in this light, the evidence presented was certainly sufficient to permit the case to go to the jury.

Plaintiffs presented sufficient evidence to make out a prima facie case that Diners' had breached its agreement by failing to promptly file a registration statement.[2] Preparation of the registration statement did not begin until late

July, 1969 and it was not filed until August 28, 1969. Although Diners' argued that it used its best efforts to cause the registration statement to become effective, it never became effective, having been withdrawn early in 1970 over the protest of plaintiff Marx.

At trial Diners' contended, and contends on these motions, that it was not responsible for the delay in filing but rather that the delay was occasioned by plaintiffs' failure to perform the conditions precedent to Diners' obligation to file. Diners' contends that its obligation to register plaintiffs' shares was subject to receipt of an amount sufficient to reimburse it for one-half of all registration expenses and delivery by plaintiffs of an indemnity agreement. Further, Diners argues that upon receipt of the registration request it had two other performance options under the agreement, either of which could be pursued in lieu of registration.

Although it is ordinarily true, as Diners' argues, that a plaintiff must prove as an element of his cause of action for breach of contract the due performance by him of all conditions precedent, see, e.g., Marine Trust Co. of Buffalo v. Gilfillan, 258 A.D. 296, 17 N.Y.S.2d 107 (4th Dep't 1939); 3A A. Corbin, On Contracts §628, at 16 (1960), it is equally well-settled that a party cannot insist upon a condition precedent when he himself has caused its non-

performance. Wagner v. Dereckton, 306 N.Y. 386, 118 N.E.2d 570 (1954). From the evidence adduced at trial, the jury could have reasonably determined that upon receipt of plaintiffs' request Diners' did nothing. It failed to elect from among the options for performance available to it under the agreement and did not request a specific amount from plaintiffs representing one-half the registration costs until July 15, 1969, well after the registration statement should have been filed. Further, the sum finally requested was considerably in excess of the reasonable expenses to be incurred. It was not until August, 1969 that Diners' even raised the question of plaintiffs providing the indemnity agreement, although in the April 16, 1969 letter plaintiffs offered to provide one in accordance with the terms of the October 10, 1967 agreement. From all these facts, the jury could have reasonably concluded that Diners' acted in bad faith and thereby prevented or hindered performance of the conditions precedent in order to avoid its obligation to file a registration statement.

Moreover, Diners' contentions were covered in the Court's charge without objection by defendants. Rule 51, Fed. R. Civ. P., specifically provides that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider

its verdict, stating distinctly the matter to which he objects and the grounds of his objection." A party cannot resurrect such an objection on a motion for judgment notwithstanding the verdict. Jennings v. Boehning & Co., 388 F. Supp. 1294, 1303-04 (E.D. Pa. 1975); see Cohen v. Franchard Corp., 478 F.2d 115 (2d Cir.), cert. denied, 414 U.S. 857 (1973).

Diners' also argues that the parties entered an accord on August 27, 1969, thereby precluding plaintiffs from asserting any claim based on whatever superseded obligation Diners' may have had. Rule 8(c), Fed. R. Civ. P., requires that an accord be affirmatively pleaded, which does not appear to have been done.[3] Diners' attempt to assert this affirmative defense after trial must be rejected.

Defendants also move for a new trial on the ground that the verdict was against the weight of the evidence. The standard by which evidence is judged on a motion for a new trial is less stringent than upon a motion for judgment notwithstanding the verdict. However, determination of that motion rests within the sound discretion of the trial court to see that there is no miscarriage of justice. 6 A. Moore's Federal Practice ¶59.08[5] (1972). As discussed above, there was sufficient evidence to warrant submission of the case to the jury. Upon review of the probative evidence in the case,

together with the inferences which the jury could reasonably have drawn therefrom, and evaluating all the testimony, the Court is persuaded that the jury's verdict was neither unsupported by the evidence, nor against "the right and justice of the case." Wright and Miller, supra, §2531.

Defendants raise additional claims of error, arguing that there were occurrences at the trial which were sufficiently grave and had consequences so prejudicial that these errors require a new trial. These claims revolve around the Court's permitting plaintiffs to call Stanley Friedman, a witness not named in the pre-trial order, as a rebuttal witness over defendants' objection.[4]

First, defendants contend that Friedman was a surprise witness and that they were, therefore, unable to prepare for his cross-examination. This contention is without merit. It was within the Court's discretion to permit Friedman to testify and the fact that he was not listed in the pre-trial order, standing alone, does not warrant a new trial. See Stewart v. Meyers, 353 F.2d 691 (7th Cir. 1965). Plaintiffs' counsel supplied defendants with Friedman's name and the subject on which he would testify as an expert witness one week before he was called to testify. Within that week there were two full weekdays, in addition to the weekend, during which no proceedings were had in the trial.

there was, thus, sufficient notice to defendants to enable them to prepare for Friedman's testimony. Moreover, at no time did defendants' counsel request a continuance to prepare for cross-examination or to obtain their own expert. In light of all the facts and circumstances, no substantial injustice resulted from permitting Friedman to testify.

Defendants next contend that although it may have been proper for Friedman to testify on plaintiffs' direct case, it was error to permit him to testify on rebuttal. It was within the discretion of the Court to permit expert testimony on rebuttal. See Sanchez v. Safeway Stores, Inc., 451 F.2d 998 (10th Cir. 1971); Casey v. Seas Shipping Co., 178 F.2d 360 (2d Cir. 1949). Diners' defense to plaintiffs' contract claim was that it had no duty to file the registration statement until August and that its duty was fully discharged by the actions taken. Mr. Friedman gave his opinion, in rebuttal, that a registration statement should have been filed by June 20, 1969 and become effective by the end of August, 1969. Accordingly, it was not error to permit him to testify on rebuttal.

Nor was it prejudicial error to allow Friedman, an expert witness, to give his opinion as to when the registration statement should have been filed or the time within which the registration statement should have become effective or to

allow him to testify in reliance on the 1970 SEC Annual Report. The admission of Friedman's expert testimony, subject to the limiting instructions given at trial, was a proper exercise of the trial court's discretionary power over the progress of the trial. United States v. Cohen, Dkt. Nos. 74-2026-2027-2065 (2d Cir. June 26, 1975).

Diners' also argues that the jury made an erroneous determination of plaintiffs' damages. The Court having found that the jury's verdict was neither unsupported by the evidence nor against "the right and justice of the case," and no objection having been taken to the Court's charge on damages, one of the alternative measures of damages being the damages awarded by the jury, this argument must be rejected.

Finally, defendants contend that the plaintiffs' verdict on their counterclaims was against the weight of the evidence. The primary claim pressed on this motion is that plaintiffs maintained an interest in Travelco, Inc. ("Travelco"), undisclosed to defendants, in violation of the October 10, 1967 agreement and their fiduciary responsibilities. At trial, the evidence produced on behalf of defendants tended to establish that plaintiffs had agreed prior to Diners' acquisition of Fugazy to indemnify the purchaser of their interest in Travelco in the event he was held liable on a guarantee of a bank loan to the corporation. Additionally, plaintiffs had

an option to purchase a controlling interest in Travelco in the event the bank loan was repaid. The Fugazy's were, also, officers and directors of Travelco.

Plaintiffs denied retaining any interest in Travelco and testified that they had fully divested themselves of all interests, direct or indirect, by October 30, 1967. Evidence introduced by plaintiffs tended to establish that the terms of the Travelco transaction were disclosed to defendants. Further, they testified that the management services contract between Fugazy Travel Bureau and Travelco and the nature of the business required the Fugazy's to remain officers and directors of Travelco. They further testified, without contradiction, that they were officers and directors of many Fugazy franchises and that this was known to defendants. It is undisputed that the management services contract was disclosed to defendants at the time of Diners' acquisition of Fugazy.

The jury chose to believe plaintiffs. All the evidence was presented and counsel for defendants ably made the same arguments to the jury as he now makes to this Court. Moreover, defendants concede that the jury was correctly charged on the law. Defendants bore the burden of persuasion and it cannot be said that the jury's verdict was without support in the evidence. The portion of defendants' motion which seeks a new trial on their counterclaims is, accord-

ingly, denied.

The Court has considered the other arguments which defendants advance and finds defendants' contentions to be without merit. Therefore, the motions are in all respects denied.

It is so ordered.

Dated: September 23, 1975

Robert J. Ward
U. S. D. J.

NOTES

1 Paragraph 10:2(b) provides:

> If Diners shall not have filed any such registration statement subsequent to January 1, 1968 and before January 1, 1969, then, provided there are outstanding more than 25,000 shares bearing legend provided for in Section 10.1(c) hereof, the registered holders thereof (but not less than all of them) may, at any time after January 1, 1969, notify Diners that they desire that Diners file such a registration statement, but only with respect to all such shares then owned by all such holders. Unless Diners shall have received an opinion from its counsel that registration is not required, or if Diners and all such registered holders, together proceeding expeditiously and in good faith after such notice, cannot obtain from the Securities and Exchange Commission a "no-action" letter with respect to the sale of such shares, then Diners shall promptly file a registration statement and use its best efforts to cause such registration statement to become effective. Diners may include in such registration statement such other of its securities as it may desire. Anything to the contrary notwithstanding, Diners need not file any such registration statement until it may lawfully use its regularly prepared fiscal year end financial statements, as a part of such registration statement. The notifying holders shall pay Diners in advance an amount sufficient to reimburse Diners for one-half of all registration fees, printing costs, auditing fees (but only in excess of normal fees paid by Diners for its fiscal year end audit), legal fees and all other incidental out-of-pocket expenses incurred in connection with such registration statement.

2 Diners' appears to argue that plaintiffs' contract claim was limited to Diners' failure to exercise its best efforts to cause the registration statement to become effective. It contends that the claim did not take the form in which it was submitted to the jury

until plaintiffs presented their rebuttal evidence. In fact, from the outset of the trial plaintiffs contended that Diners' breached the October 10, 1967 agreement both in the failure to promptly file a registration statement and the failure to use its best efforts to cause the registration statement, ultimately filed, to become effective. In light of the numerous instances throughout the trial in which the contract claim was outlined by the plaintiffs and the Court, and Diners' agreement to the form of the special verdict submitted to the jury, Diners' belated argument that only the failure to use "best efforts" was in issue must be deemed an afterthought.

3 See amended answer filed January 28, 1971 (70 Civ. 3064); and answer and counterclaims filed January 15, 1973 (72 Civ. 4324).

4 The trial transcript does not reflect that defendants objected to the calling of Mr. Friedman. Defendants have applied to the Court to correct the record to note their objection. It is the Court's recollection that at a conference between counsel and the Court after the jury had left the courtroom, plaintiffs' counsel indicated his intention to call an expert witness on his rebuttal case. Counsel for defendants objected to the calling of a witness not listed in the pre-trial order. The Court, after requiring plaintiffs' counsel to name the rebuttal witness, overruled counsel's objection and indicated he could testify. Mr. Friedman testified one week later. Inasmuch as the conference does not appear to have been transcribed, the record is deemed corrected to reflect defendants' objection and the Court's ruling.

PLAINTIFFS' NOTICE OF MOTION FIXING THE DATE FROM WHICH PRE-VERDICT INTEREST SHOULD BE COMPUTED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al., Plaintiffs, -against- THE DINERS' CLUB, INC., et al., Defendants, -against- WILLIAM D. FUGAZY, et ano., Third-Party Defendants.	Consolidated Case 72 Civ. 4324 70 Civ. 3064 (RJW)
WILLIAM D. FUGAZY, et ano., Plaintiffs, -against- THE DINERS' CLUB, INC., et al., Defendants, -against- MARX & CO., INC., et al., Additional Defendants on the Counterclaims.	NOTICE OF MOTION

S I R S:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Barry I. Fredericks, sworn to October 2, 1975, the memorandum of law submitted herewith, and all the pleadings and proceedings had herein, plaintiffs Otto Marx, Jr., John V. Summerlin, William D. Fugazy and Louis V. Fugazy, by their undersigned attorneys, will move this Court, before the Honorable Robert J. Ward, United States District Judge, at the United States Courthouse, Foley Square, New York, New York,

on October 14, 1975, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order, pursuant to Section 5004 of the New York Civil Practice Law and Rules, and Rule 58 of the Federal Rules of Civil Procedure, fixing September 1, 1969 as the date from which pre-verdict interest on the award rendered by the jury on May 28, 1975 in favor of plaintiffs and against the defendant Diners' Club, Inc. be computed, directing that said interest be computed at the rate of 7-1/2 per centum per annum from the date so fixed by the Court until September 1, 1972 and further directing that interest be computed at the rate of 6 per centum per annum thereafter until the date of the verdict.

October 2, 1975

HARRIS FREDERICKS & KORODKIN

By _____
A Member of the Firm
Attorneys for Plaintiffs
1271 Avenue of the Americas
New York, New York 10019
(212) 489-1504

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al., Plaintiffs, -against- THE DINERS' CLUB, INC., et al., Defendants, -against- WILLIAM D. FUGAZY, et ano., Third-Party Defendants.	Consolidated Case 72 Civ. 4324 70 Civ. 3064 (RJW)
WILLIAM D. FUGAZY, et ano., Plaintiffs, -against- THE DINERS' CLUB, INC., et al., Defendants, -against- MARX & CO., INC., et al., Additional Defendants on the Counterclaims..	AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BARRY I. FREDERICKS, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the Courts of the State of New York and in this District and am a member of the firm of Harris, Fredericks & Korobkin, attorneys for plaintiffs. I make this affidavit in support

of plaintiffs' motion for an order fixing September 1, 1969 as the date from which pre-verdict interest should be computed on the sums awarded plaintiffs on account of defendant Diners' breach of contract and awarding interest at the legal rate of 7-1/2 percent per annum from September 1, 1969 to September 1, 1972 and 6 percent per annum thereafter.

2. After trial of this action, which commenced on May 6, 1975 and was concluded on May 28, 1975, the jury returned a special verdict in plaintiffs' favor upon their claim that Diners' breached its contractual obligations to plaintiffs and awarded damages to plaintiffs as follows:

Otto Marx, Jr.	$240,000
John V. Summerlin	44,000
William D. Fugazy	124,500
Louis V. Fugazy	124,500

Defendant Diners' moved for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur on plaintiffs' contract claim. The Court, on September 23, 1975, denied Diners' motion.

3. Pursuant to Section 5001 of New York's Civil Practice Law and Rules, interest on a jury's award in a breach of contract action is computed from the "earliest ascertainable date" the breach existed. The "earliest ascertainable date" that Diners' breach existed was late August 1969. Plaintiffs introduced evidence at trial establishing that Diners' did not begin to prepare the registration statement until late July 1969, despite the fact that plaintiffs requested registration on April 16, 1969 (P. Exhs. 27, 28; Tr. Asch 1167-69; Tr. Faunce 1707-08). Plaintiffs further established that had Diners proceeded expeditiously and done everything that it was supposed to do to cause the registra-

tion statement to become effective, the registration statement would have become effective approximately 70 days after the original filing, i.e., August 29, 1969 (Tr. Friedman 1744 - 48).

4. Pursuant to Section 5004 of the Civil Practice Law and Rules and case law interpreting that section, pre-verdict interest on plaintiffs' breach of contract claim should be computed at the legal rate of 7-1/2 percent per annum from September 1, 1969 to September 1, 1972 and 6 percent per annum thereafter.

5. Based on the foregoing, it is respectfully submitted that pre-verdict interest be computed from September 1, 1969, at the legal rate of 7-1/2 percent per annum from September 1, 1969 to September 1, 1972 and 6 percent per annum thereafter.

S/ Barry I. Fredericks
Barry I. Fredericks

Sworn to before me this
2nd day of October, 1975

S/ Myrtle B. Lang
Notary Public
Myrtle B. Lang
Notary Public, State of New York
No. 41-2249350
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1972.

A-424

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARY-ROSE SMITH, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 333 West 86th Street, New York, New York 10024. On October 2nd, 1975, deponent served the within NOTICE OF MOTION AND SUPPORTING AFFIDAVIT upon Hardee, Barovick, Konecky & Braun, Esqs., attorneys for defendant The Diners' Club, Inc. in this action, at One Dag Hammarskjold Plaza (31st Fl.), New York, New York 10017 the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depositiory under the exclusive care and custody of the United States Postal Servic within the State of New York.

Mary-Rose Smith
Mary-Rose Smith

Sworn to before me on this
3rd day of October, 1975.

Myrtle B. Lacy
MYRTLE B. LACY
Notary Public, State of New York
No. 41-0210050
Qualified in Queens County
Cert. Filed in New York County
Commission Expires March 30, 1977

Oct. 14, 1975

A-425

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION THAT PRE-VERDICT INTEREST BE COMPUTED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO, INC., et al.,	:	
Plaintiffs,	:	
-against-	:	
THE DINERS' CLUB, INC., et al.,	:	
Defendants,	:	
-against-	:	
WILLIAM D. FUGAZY, et ano.,	:	
Third-Party Defendants.	:	Consolidated Case
		72 Civ. 4324
WILLIAM D. FUGAZY, et ano.,	:	70 Civ. 3064 (RJW)
Plaintiffs,	:	
-against-	:	
THE DINERS' CLUB, INC., et al.,	:	
Defendants,	:	
-against-	:	
MARX & CO., INC., et al.,	:	
Additional Defendants on the Counterclaims.	:	

REPLY MEMORANDUN IN SUPPORT OF PLAINTIFFS' MOTION FOR PRE-VERDICT INTEREST ON THE JURY'S AWARD COMPUTED FROM SEPTEMBER 1, 1969

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
299 PARK AVENUE, NEW YORK, N.Y. 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al., Plaintiffs, - against - THE DINERS' CLUB, INC., et al., Defendants, - against - WILLIAM D. FUGAZY, et ano., Third-Party Defendants.	Consolidated Case 72 Civ. 4324
WILLIAM D. FUGAZY, et ano., Plaintiffs, - against - THE DINERS' CLUB, INC., et al., Defendants, - against - MARX & CO., INC., et al., Additional Defendants on the Counterclaims.	70 Civ. 3064 (RJW)

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRE-VERDICT INTEREST ON THE JURY'S AWARD COMPUTED FROM SEPTEMBER 1, 1969

Preliminary Statement

This memorandum is submitted on behalf of plaintiffs Otto Marx, Jr., John V. Summerlin, Jr., William D. Fugazy and Louis V. Fugazy in reply to defendant Diners' unsupported contentions that the recovery of pre-verdict interest on the jury's breach of contract award to plaintiffs is a matter of judicial discretion and that, exercising such discretion, the Court should deny interest in the instant case on considerations of "fundamental fairness."

These contentions disregard the jury's explicit finding that Diners breached paragraph 10.2(b) of the October 10, 1967 Acquisition Agreement and this Court's denial in all respects of defendants' motions for, inter alia, judgment notwithstanding the verdict with respect to plaintiffs' contract claim. Most significantly, they fly in the face of the controlling statutory mandate of CPLR § 5001 that pre-verdict interest is to be recovered as a matter of right on sums awarded because of a breach of performance of a contract.

POINT I

AS A MATTER OF LAW, PLAINTIFFS ARE ENTITLED TO PRE-VERDICT INTEREST ON THE JURY'S AWARD

Under Section 5001 of the New York Civil Practice Law and Rules, pre-verdict interest* is recoverable as a matter of right** "upon a sum awarded because of a breach of performance of a contract" and is to be computed from the "earliest ascertainable date the cause of action existed." NYCPLR § 5001(a), (b) (McKinney 1963); Rock Properties Corp., v. Hartford Fire Ins. Co., 312 F. Supp. 341, 348 (S.D.N.Y. 1970); DeLong Corp. v. Morris

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* Defendant Diners claims that plaintiffs are not entitled to interest prior to the entry of judgment. New York statutory law provides, however, for interest as a matter of right from the date the cause of action existed to verdict and from verdict to date of judgment. NYCPLR §§ 5001, 5002 (McKinney 1963).

**That plaintiffs in the instant case did not request the jury to fix the date from which pre-verdict interest on the jury's award is to be computed does not constitute a waiver of the right to interest. Pursuant to CPLR § 5001(c), the court upon motion is charged with fixing the date from which pre-verdict interest is to be computed. Julien J. Studley, Inc. v. Gulf Oil Corp., 425 F.2d 947, 949 (2d Cir. 1969). In fact, interest must be awarded even if it is not demanded in the complaint. First National Bank of Hollywood v. American Foam Rubber Corp., 309 F. Supp. 545 (S.D.N.Y. 1969); D'Angelo v. State, 200 Misc. 657, 106 N.Y.S.2d 358 (Ct. Cl. 1950). In any event, the ad damnum clauses of both the Marx and Fugazy complaints pray for such other, further and different relief as the court deems just and proper and the ad damnum clause in the Fugazy complaint specifically asks for interest.

Knudsen Co., 14 N.Y.2d 346, 251 N.Y.S.2d 657, 200 N.E.2d 557 (1964); D'Angelo v. State, 200 Misc. 657, 106 N.Y.S. 2d 358 (Ct. Cl. 1950).

In an effort to evade this statutory mandate, Diners asserts that CPLR § 5001 "applies only to state court actions and cases in federal courts where jurisdiction is based upon diversity of citizenship" (Diners' Memorandum of Law at 3). The thrust of its contention is that the jurisdictional allegation in the complaint, rather than the substance of the right sued upon, determines whether federal or state law applies. Diners' position is erroneous and in contravention of the doctrine set down in Erie RR. v. Tompkins, 304 U.S. 64 (1938):

> "It has frequently been stated that the Erie doctrine requires the federal courts to apply state law in diversity cases and that the doctrine has no application in actions in the federal courts on some other jurisdictional grounds. While this is true in a vast number of cases, it is not a completely accurate statement of the law. The law to be applied is keyed to the nature of the issue before the court; if non-federal, state substantive law is applied; if a federal matter is before the court, federal law will be applied." 1A J. Moore, Federal Practice ¶ 0.305[3] at 3052-53 (2d Ed. 1974).

Thus, in order to warn those who would rely upon labels such as "diversity," the Second Circuit stated in Maternally

Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956):

> "...[D]espite repeated statements implying the contrary, it is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded which determines the governing law ... Thus the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law."

At trial, plaintiffs clearly proved and the jury found that Diners breached its contract to promptly file a registration statement covering the restricted Diners' Common Stock held by plaintiffs and to use its best efforts to cause the registration statement to become effective -- a cause of action clearing having its source in state law.* CPLR § 5001 is applicable to plaintiffs' breach of contract cause of action in this Court, whether the Court's jurisdiction over the cause of action is founded on diversity of citizenship or otherwise. Plaintiffs are therefore

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* The cases cited by Diners (Diners' Memorandum of Law at 3-4) for the proposition that the awarding of pre-judgment interest in this case is a matter of federal law are clearly inapposite. In each case, pre-judgment interest was sought upon sums awarded because of violations of the federal securities laws -- claims created and controlled exclusively by federal law -- and not, as here, upon sums awarded because of a clear-cut breach of contract.

entitled to recover pre-verdict interest as a matter of right.*

Moreover, even if the awarding of pre-verdict interest were discretionary in the instant case, Diners' latest appeal to the Court amounts to nothing more than a rehash of unsupported contentions and accusations** presented at trial and in its motion for judgment notwithstanding the verdict. These contentions and accusations were rejected by the jury and by the Court.

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* Whether Diners had use of the funds upon which the jury's verdict is based is irrelevant to the issue of whether plaintiffs are entitled to pre-verdict interest. In Julien J. Studley, Inc. v. Gulf Oil Corp., supra, for example, the Second Circuit reversed the district court's denial of interest to plaintiff based on considerations of fundamental fairness since "Gulf had not had the use of the money to which Studley was entitled," holding that "the New York statute provides interest as a matter of right in cases [for breach of contract]." 452 F.2d at 949-50. (Emphasis Added).

**Diners argues that plaintiffs delayed in the prosecution of their lawsuit and that, as a result, it would be unfair to award interest to plaintiffs from September 1, 1969. Diners conveniently overlooks the fact that plaintiffs are entitled to interest as a matter of right from the time the cause of action existed. In any event, any delay in the progress of this lawsuit resulted from Diners' never-ending affinity for discovery. For example, Diners first took the deposition of William Fugazy on July 22, 1971 and proceeded to take his deposition eight times before finally finishing on July 3, 1974.

Considerations of "fundamental fairness" militate in favor of the plaintiffs. The record is clear that, in breach of its contractual obligation, Diners did nothing to bring about effective registration of plaintiffs' restricted Diners' Common Stock. Furthermore, this Court found, based upon all the facts introduced at trial, that the "jury could have reasonably concluded that Diners' acted in bad faith and thereby prevented or hindered performance of the conditions precedent in order to avoid its obligation to file a registration statement." (Opinion of Judge Ward dated September 23, 1975 at 6). After considering all the evidence, the jury found that plaintiffs were damaged in the amount of $533,000 -- a substantial amount to which plaintiffs were entitled from the end of August 1969 and which they would have had at their disposal but for Diners' breach of performance.

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POINT II

UNDER CPLR § 5001, PLAINTIFFS ARE ENTITLED TO PRE-VERDICT INTEREST COMPUTED FROM SEPTEMBER 1, 1969

Diners' make-shift arguments in opposition to fixing September 1, 1969 as the date from which pre-verdict interest is to be computed are in direct conflict with the express language of § 5001 and the long-standing judicial recognition that "the broad purposes sought to be accomplished by § 5001 are best served by a flexible, common sense approach to the question of when the cause of action initially arose."* Collier v. Granger, 258 F. Supp. 717, 719 (S.D.N.Y. 1966).

The jury may not have specified in its verdict the exact date from which interest is to be computed, but the evidence introduced at trial and the amount of the jury's award** clearly supports a finding that, had Diners

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* The directive of NYCPLR § 5001(b) is aimed at "giving the plaintiff the most favorable basis for determining the accrual date of his cause of action for purposes of computing interest." Weinstein, Korn & Miller, 5 New York Civil Practice ¶ 5001.10 at 50-29 (1974).

**Diners' speculation that "the jury, in reaching its verdict, [may have] made an allowance for interest on its own" (Diners' Memorandum of Law at 7), can be rejected out of hand. It is not the function of the jury to compute interest. The purpose of the revision to § 5001(c) providing that the clerk of the court, and not the jury, is responsible for adding interest to the verdict, was to eliminate the problem of determining whether the jury

(continued)

not breached its contractual obligation, the registration statement would have become effective by the end of August 1969.*

Furthermore, there is no merit to Diners' contention that the jury's verdict is so fatally unclear with respect to the date from which damages were awarded that interest "is to be awarded from the date of commencement of the action, and from no earlier date." (Diners' Memorandum of Law at 7) The mandate of § 5001(b) is clear -- "interest shall be computed from the earliest ascertainable date the cause of action existed." Computing interest from the date of commencement of the action is a measure of last resort to be employed only when it is impossible for the Court to ascertain any earlier date.**

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award included any amount for interest. Julien J. Studley, Inc. v. Gulf Oil Corp., supra at 950; Weinstein, Korn & Miller, 5 New York Civil Practice, ¶ 5001.14 (1974).

* See Memorandum in Support of Plaintiffs' Motion at 5-7.

**If the cases cited by Diners (Diners' Memorandum of Law at 7-8) stand for anything, they stand for the proposition that where it is impossible to ascertain the date from which the cause of action existed or any reasonable intermediate date -- either because plaintiff failed to introduce at trial any proof as to the date of the breach of contract or the court, by putting itself in the position of the jury, cannot determine which items of damages were included in the jury's award -- then the date of commencement of the action should be used as the outside date in computing interest. Here, plaintiffs introduced substantial evidence that the registration statement should have become effective by the end of August

(continued)

Mathis v. Matthews, 39 N.Y.S.2d 242 (Sup. Ct. 1943). Where, as here, it is obvious from the testimony of plaintiffs' expert witness, Stanley Friedman, and the exhibits introduced at trial, that plaintiffs' breach of contract cause of action existed as of September 1, 1969, pre-verdict interest must be computed from that ascertainable date.* Pierce v. Richard Ellis & Co., 62 Misc.2d 771, 310 N.Y.S.2d 266 (N.Y.C. Civ. Ct. 1970).

1969 and the only items of damages included in the jury's award were the damages for Diners' breach of paragraph 10.2(b) of the October 10, 1967 Acquisition Agreement.

* There clearly is no merit to Diners' contention that the policy behind the allowance of pre-verdict interest dictates that May 1975 -- the month of trial -- be fixed for the computation of interest. In paragraph 11(h) of both the Marx and Fugazy complaints, plaintiffs pleaded and put Diners on notice that they intended to prove that Diners failed to use its best efforts to cause the registration statement to become effective.

POINT III

PLAINTIFFS, AS "THE PREVAILING PARTY" UNDER FRCP 54(d), ARE ENTITLED TO RECOVER THEIR COSTS

Rule 54(d) of the Federal Rules of Civil Procedure provides in pertinent part that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs...."

Since plaintiffs recovered on their breach of contract claim, they are "the prevailing party," irrespective of the fact that they did not sustain all of their claims. In Ryan v. Arabian American Oil Co., 18 F.R.D. 206, 207 (S.D.N.Y. 1955), the court stated:

> "...since plaintiff recovered a judgment he is the prevailing party, even though he failed to sustain all his claims.

Accord, Simmons v. American Export Lines, Inc., 26 F.R.D. 111 (S.D.N.Y. 1960).

Diners claims, however, that since plaintiffs recovered on one of three causes of action, costs should be apportioned accordingly. As was made clear in Sperry Rand Corp. v. A-T-O, Inc., 58 F.R.D. 132, 135 (E.D. Va. 1973), costs should not be apportioned between parties according to the claims presented at trial:

> "It is the defendants' position that ... since the plaintiff prevailed

> on one claim and not on another, the Court should declare there to be no prevailing party. The defendants' argument is patently specious and warrants but brief discussion: a party in whose favor judgment is rendered is the prevailing party, regardless of whether he sustains his entire claim or only a part thereof."

Defendants also claim that Continental Insurance Company, Continental Corporation and Diners World Travel are entitled to costs. Defendants Continental Insurance Company, Continental Corporation and Diners World Travel cannot be considered "prevailing parties," under FRCP 54(d), since each was inextricably linked with Diners, the party liable on the breach of contract cause of action. At the time of the breach, Continental Corporation was the holding company of Continental Insurance, which owned outright 34% of Diners' Common Stock and Diners World Travel was a wholly-owned subsidiary of Diners. The relationship between these companies is highlighted by the fact that the chief operating officers of Continental were directors of Diners. J. Victor Herd was chairman of the board of Continental Corporation and Continental Insurance and a director of Diners (Trial Transcript Herd 1228, 1230); Harold E. Johnson was executive vice president of Continental Insurance and a director of Diners (Trial Transcript Johnson 1184, 1186). It must be remembered that it was Mr. Johnson who in a note to Mr. Herd dated April 24, 1969 stated that

his reaction was to do nothing with respect to plaintiff Otto Marx's request for registration (Plaintiffs' Exhibit 29). See Opinion of Judge Ward dated September 23, 1975 at 3-4.

Conclusion

Accordingly, plaintiffs are entitled, as a matter of law, to interest on the jury's award from September 1, 1969, the earliest ascertainable date their breach of contract cause of action existed, at the rate of 7-1/2% per annum until September 1, 1972, and at the rate of 6% per annum thereafter. In addition, plaintiffs are entitled to their costs.

October 14, 1975

Respectfully submitted,

HARRIS, FREDERICKS & KOROBKIN
Attorneys for Plaintiffs
1271 Avenue of the Americas
New York, New York 10019

OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
299 Park Avenue
New York, New York 10017

Of Counsel

A-439
AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,

Defendants,

F.T. VENTURES, INC.,

Additional Defendant,

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Third Party Defendants.

CONSOLIDATED ACTION

70 Civ. 3064
(Judge Ward)

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al,

Defendants,

MARX & CO., INC., et al.,

Additional Defendants
On the Counterclaims.

72 Civ. 4324

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

BARRY I. FREDERICKS, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and a member of the firm of Harris, Fredericks & Korobkin, attorneys for the above-named plaintiffs and as such am fully familiar with all the facts and circumstances set forth herein.

2. This affidavit is made in support of plaintiffs' request for pre-judgment interest. Plaintiffs have submitted memoranda in support of this motion in addition to this affidavit.

3. On May 28, 1975 the jury in the above-entitled action returned a verdict in favor of the plaintiffs on plaintiffs' claim that the defendant Diners' Club had breached its contractual obligation to promptly file a registration statement for the restricted shares of Diners' stock held by the plaintiffs and to use their best efforts in causing said registration to become effective. The contractual obligation which the jury found that the Diners' Club breached is to be found in Section 10.2(b) of the Purchase Agreement between the plaintiffs and the defendant Diners' Club (see Pages 8 and 9 of plaintiffs' amended complaint annexed as Exhibit 1 to the defendants' opposing papers). The jury awarded plaintiffs cumulative damages in the amount of $533,000 to be allocated among the various plaintiffs.

4. §5001 of the New York Civil Practice Law and Rules expressly provides for pre-judgment interest in an action for breach of contract. Specifically, a detailed discussion of §5001 and its impact on the instant motion is set forth at length in the memoranda accompanying the instant motion and no useful purpose would be served by repeating same here.

5. Defendants' opposition to plaintiffs' motion is based upon the claims that the defendants purchased "a bankrupt company" and "suffered losses of $30,000,000 as a result of the operations of Fugazy Travel Bureau between 1967 and 1970"; and "the enormous expenses which Diners' has been put to in defending" this action. These arguments by defendants' counsel can only be viewed as an exercise in repetition, for they are the very same arguments that counsel made in the opening statement to the jury; in his closing statement to the jury; his oral arguments for judgment, not-

withstanding the verdict; in his written motions, notwithstanding the verdict. The jury and the court have continuously rejected the defendants' pleas, and for the plaintiffs to again respond to these arguments would only result in an unnecessary boon to the Xerox Company and an ecological waste of paper.

6. The sum and substance of plaintiffs' motion is for pre-judgment interest based upon the jury's award to plaintiffs of substantial damages based upon an action for breach of contract. Thus, as a matter of law, plaintiffs are entitled to interest from the earliest ascertainable date therein. From the testimony at the trial the earliest ascertainable date for the computation of interest is August 29, 1969. The plaintiffs are seeking interest from September 1, 1969. Therefore, plaintiffs' motion is properly made and should be granted.

WHEREFORE, deponent prays that plaintiffs' motion for pre-judgment interest should be in all respects granted.

Sworn to before me this
13th day of October, 1975.

Myrtle B. Lang

MYRTLE B. LANG
Notary Public, State of New York
No. 41-2249350
Qualified in Queens County
Cert. Filed in New York County
Commission Expires March 30, 1977

A-442
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A-444

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These contentions disregard the jury's explicit finding that Diners breached paragraph 10.2(b) of the October 10, 1967 Acquisition Agreement and this Court's denial in all respects of defendants' motions for, inter alia, judgment notwithstanding the verdict with respect to plaintiffs' contract claim. Most significantly, they fly in the face of the controlling statutory mandate of CPLR § 5001 that pre-verdict interest is to be recovered as a matter of right on sums awarded because of a breach of performance of a contract.

A-445

POINT I

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Considerations of "fundamental fairness" militate in favor of the plaintiffs. The record is clear that, in breach of its contractual obligation, Diners did nothing to bring about effective registration of plaintiffs' restricted Diners' Common Stock. Furthermore, this Court found, based upon all the facts introduced at trial, that the "jury could have reasonably concluded that Diners' acted in bad faith and thereby prevented or hindered performance of the conditions precedent in order to avoid its obligation to file a registration statement." (Opinion of Judge Ward dated September 23, 1975 at 6). After considering all the evidence, the jury found that plaintiffs were damaged in the amount of $533,000 -- a substantial amount to which plaintiffs were entitled from the end of August 1969 and which they would have had at their disposal but for Diners' breach of performance.

A-450
POINT II

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Furthermore, there is no merit to Diners' contention that the jury's verdict is so fatally unclear with respect to the date from which damages were awarded that interest "is to be awarded from the date of commencement of the action, and from no earlier date." (Diners' Memorandum of Law at 7). The mandate of § 5001(b) is clear -- "interest shall be computed from the earliest ascertainable date the cause of action existed." Computing interest from the date of commencement of the action is a measure of last resort to be employed only when it is impossible for the Court to ascertain any earlier date.**

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award included any amount for interest. Julien J. Studley, Inc. v. Gulf Oil Corp., supra at 950; Weinstein, Korn & Miller, 5 New York Civil Practice, ¶ 5001.14 (1974).

* See Memorandum in Support of Plaintiffs' Motion at 5-7.

**If the cases cited by Diners (Diners' Memorandum of Law at 7-8) stand for anything, they stand for the proposition that where it is impossible to ascertain the date from which the cause of action existed or any reasonable intermediate date -- either because plaintiff failed to introduce at trial any proof as to the date of the breach of contract or the court, by putting itself in the position of the jury, cannot determine which items of damages were included in the jury's award -- then the date of commencement of the action should be used as the outside date in computing interest. Here, plaintiffs introduced substantial evidence that the registration statement should have become effective by the end of August

(continued)

Mathis v. Matthews, 39 N.Y.S.2d 242 (Sup. Ct. 1943). Where, as here, it is obvious from the testimony of plaintiffs' expert witness, Stanley Friedman, and the exhibits introduced at trial, that plaintiffs' breach of contract cause of action existed as of September 1, 1969, pre-verdict interest must be computed from that ascertainable date.* Pierce v. Richard Ellis & Co., 62 Misc.2d 771, 310 N.Y.S.2d 266 (N.Y.C. Civ. Ct. 1970).

1969 and the only items of damages included in the jury's award were the damages for Diners' breach of paragraph 10.2(b) of the October 10, 1967 Acquisition Agreement.

* There clearly is no merit to Diners' contention that the policy behind the allowance of pre-verdict interest dictates that May 1975 -- the month of trial -- be fixed for the computation of interest. In paragraph 11(h) of both the Marx and Fugazy complaints, plaintiffs pleaded and put Diners on notice that they intended to prove that Diners failed to use its best efforts to cause the registration statement to become effective.

A-453

POINT III

PLAINTIFFS, AS "THE PREVAILING PARTY" UNDER FRCP 54(d), ARE ENTITLED TO RECOVER THEIR COSTS

Rule 54(d) of the Federal Rules of Civil Procedure provides in pertinent part that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs...."

Since plaintiffs recovered on their breach of contract claim, they are "the prevailing party," irrespective of the fact that they did not sustain all of their claims. In Ryan v. Arabian American Oil Co., 18 F.R.D. 206, 207 (S.D.N.Y. 1955), the court stated:

> "...since plaintiff recovered a judgment he is the prevailing party, even though he failed to sustain all his claims.

Accord, Simmons v. American Export Lines, Inc., 26 F.R.D. 111 (S.D.N.Y. 1960).

Diners claims, however, that since plaintiffs recovered on one of three causes of action, costs should be apportioned accordingly. As was made clear in Sperry Rand Corp. v. A-T-O, Inc., 58 F.R.D. 132, 135 (E.D. Va. 1973), costs should not be apportioned between parties according to the claims presented at trial:

> "It is the defendants' position that ... since the plaintiff prevailed

> on one claim and not on another, the Court should declare there to be no prevailing party. The defendants' argument is patently specious and warrants but brief discussion: a party in whose favor judgment is rendered is the prevailing party, regardless of whether he sustains his entire claim or only a part thereof."

Defendants also claim that Continental Insurance Company, Continental Corporation and Diners World Travel are entitled to costs. Defendants Continental Insurance Company, Continental Corporation and Diners World Travel cannot be considered "prevailing parties," under FRCP 54(d), since each was inextricably linked with Diners, the party liable on the breach of contract cause of action. At the time of the breach, Continental Corporation was the holding company of Continental Insurance, which owned outright 34% of Diners' Common Stock and Diners World Travel was a wholly-owned subsidiary of Diners. The relationship between these companies is highlighted by the fact that the chief operating officers of Continental were directors of Diners. J. Victor Herd was chairman of the board of Continental Corporation and Continental Insurance and a director of Diners (Trial Transcript Herd 1228, 1230); Harold E. Johnson was executive vice president of Continental Insurance and a director of Diners (Trial Transcript Johnson 1184, 1186). It must be remembered that it was Mr. Johnson who in a note to Mr. Herd dated April 24, 1969 stated that

his reaction was to do nothing with respect to plaintiff Otto Marx's request for registration (Plaintiffs' Exhibit 29). See Opinion of Judge Ward dated September 23, 1975 at 3-4.

Conclusion

Accordingly, plaintiffs are entitled, as a matter of law, to interest on the jury's award from September 1, 1969, the earliest ascertainable date their breach of contract cause of action existed, at the rate of 7-1/2% per annum until September 1, 1972, and at the rate of 6% per annum thereafter. In addition, plaintiffs are entitled to their costs.

October 14, 1975

Respectfully submitted,

HARRIS, FREDERICKS & KOROBKIN
Attorneys for Plaintiffs
1271 Avenue of the Americas
New York, New York 10019

OLWINE, CONNELLY, CHASE,
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Of Counsel

Court Papers
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A-456
JUDGE WARD'S OPINION REGARDING
PRE-JUDGMENT INTEREST.

157

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR.,

Plaintiffs,

-against-

70 Civ. 3064

THE DINERS' CLUB, INC., DINERS'/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION, and THE CONTINENTAL INSURANCE COMPANY,

Defendants,

-against-

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Third-Party Defendants.

----------x

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs,

-against-

72 Civ. 4324

THE DINERS' CLUB, INC., DINERS'/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants,

MARX & CO., INC., OTTO MARX, JR., F.T. VENTURES, INC. and JOHN V. SUMMERLIN, JR.,

Additional Defendants on the Counterclaims.

----------x

Plaintiffs Otto Marx, Jr., John V. Summerlin, Jr., William D. Fugazy and Louis V. Fugazy move for an order, pursuant to Rule 58, Fed. R. Civ. P. and N.Y.C.P.L.R. §§ 5001, 5004 (McKinney 1963 and Supp. 1975), setting the date from which interest shall be computed on the verdict rendered in their favor by the jury on May 28, 1975. Defendants oppose the motion and ask the Court to tax plaintiffs with the costs of this litigation.

The facts were fully set forth in this Court's opinion reported at 400 F. Supp. 581 (S.D.N.Y. 1975) and only those facts which are necessary to the determination of this motion are repeated here. Plaintiffs commenced these two actions in 1970 and 1972 alleging, in each complaint, two violations of §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)), and Rule 10b-5 promulgated thereunder. Additionally, the complaints asserted pendent state claims for breach of a contract to register shares of unregistered Diners' Club, Inc.("Diners'") stock held by plaintiffs. The jurisdiction of this Court was invoked pursuant to §27 of the Securities Exchange Act of 1934 (15 U.S.C. §77aa). At trial, one of the two securities claims was dismissed by the Court and the jury found for defendants on the second. However, plaintiffs recovered on the pendent state law breach of contract claims.

Plaintiffs now seek to have the date from which pre-verdict interest shall accrue set by the Court. They argue that under state law they are entitled to pre-verdict interest computed from the earliest ascertainable date their contract causes of action existed as a matter of right.

Defendants argue that state law does not apply in actions where jurisdiction is founded upon a federal ground. Their argument is premised on the assertion that the doctrine of Erie Railroad v. Tompkins, 304 U.S. 64 (1938) requires the application of state law only in cases within the diversity jurisdiction of the federal courts. This contention cannot be sustained. Whether state law is to be applied depends upon the nature of the issue before the federal court and not the basis for its jurisdiction. Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956); 1A J. Moore, Federal Practice ¶ .305[3] (1974). As the court in Erie stated:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."
> 304 U.S. at 78.

Thus, it is the source of the right sued upon which is determinative of whether state law should be applied. Maternally Yours, Inc. v. Your Maternity Shop, Inc., supra.

In Mintz v. Allen, 254 F. Supp. 1012 (S.D.N.Y. 1966), the court was presented with a contention similar to that urged by the defendants. The court held that state law should be applied to pendent state law claims in a shareholders' derivative action where jurisdiction was predicated upon the Investment Company Act of 1940.

In the instant actions, the contract claims arise solely under state law. The claims were submitted to the jury as controlled by state law. Indeed, even defendants in their post-trial motions treated the contract claims as controlled by state law. Accordingly, the Court holds that state law applies to the question of pre-verdict interest on the pendent contract claims under Erie as it would had the claims arisen pursuant to the Court's diversity jurisdiction. Julien J. Studley, Inc. v. Gulf Oil Corp., 425 F.2d 947 (2d Cir. 1969); St. Clair v. Eastern Airlines, Inc., 302 F.2d 477 (2d Cir. 1962); Earnest v. Donald Deskey Associates, Inc., 312 F. Supp. 1312 (S.D.N.Y. 1970).

Under New York law, the successful plaintiff in an action for breach of contract is entitled as of right to interest computed from the earliest ascertainable date the cause of action existed. N.Y.C.P.L.R. §5001; 5 Weinstein, Korn, Miller, New York Civil Practice, ¶¶ 5001.04, .10 (1974).

The statute provides for submitting to the jury the question of the date from which interest shall be calculated and, if the jury is discharged without specifying the date, the court shall fix the date. N.Y.C.P.L.R. §5001(c). Plaintiffs contend that the earliest date the causes of action existed was September 1, 1969. Defendants contend the earliest ascertainable date the causes of action can be said to exist is the commencement of the trial in May, 1975.

In fixing the date under §5001(c), the Court must determine what damages the jury's award represented. Julien J. Studley, Inc. v. Gulf Oil. Corp., supra; Earnest v. Donald Deskey Associates, Inc., supra. In effect, the Court must ascertain the earliest date the damages were sustained based upon the jury's award. See Temple Beth Sholom v. E.M. Fitzsimmons and Associates, Inc., 42 A.D.2d 739, 345 N.Y.S.2d 680 (2d Dep't 1973). When it is impossible to ascertain the earliest date represented by the jury's award, pre-verdict interest is computed from the commencement of the action. See, e.g., Earnest v. Donald Deskey Associates, Inc., supra; Temple Beth Sholom v. E.M. Fitzsimmons and Associates, Inc., supra. Consequently, the latest possible dates from which interest should be computed are 1970 and 1972, respectively. Defendants argument that interest should be computed from the commencement of the trial must, therefore, be rejected.

However, the jury's award in the instant case clearly represents damages sustained prior to the commencement of these actions. Throughout the trial plaintiffs contended that had Diners' not breached its agreement to register their stock, the stock would have been effectively registered by late August, 1969. Defendants vehemently disputed this contention. The jury found for plaintiffs and awarded damages representing the difference between what plaintiffs received for their stock and what they would have been able to receive had the stock been registered by August, 1969. Accordingly, the earliest ascertainable date plaintiffs' contract causes of action existed is September 2, 1969. Indeed, defendants' argument to the contrary represents an attempt to relitigate the question determined adversely to them by the jury and by this Court on their motion for a new trial or remittitur.

The next question is the rate at which interest should be computed. N.Y.C.P.L.R. §5004, which became effective September 1, 1972, prescribes the rate of interest as 6%. Accordingly, interest for the period subsequent to September 1, 1972 shall be computed at 6%. The difficulty arises with respect to the applicable rate of interest between September, 1969 and September, 1972. Plaintiffs contend that during this period interest should be calculated at

7 1/2%. Defendants apparently do not dispute that this was the rate during that period. Nonetheless, the Court has examined the available New York law and determined that §5004 is not retroactive and that interest prior to September, 1972 should be computed at 7 1/2%. 7 Doyer Street Realty Corp. v. The Great Cathay Development Corp., 43 A.D.2d 476, 352 N.Y.S.2d 483 (1st Dep't 1974); Rachlin & Co. v. Tra-Mar, Inc., 33 A.D.2d 370, 308 N.Y.S.2d 153 (1st Dep't 1970); Yamamoto v. Costello, 73 Misc.2d 592, 342 N.Y.S.2d 33 (Sup. Ct. 1973); 5 Weinstein, Korn and Miller, ¶5004.01 (1974).

Accordingly, the Court holds that plaintiffs are entitled to interest on the jury's award computed from September 2, 1969 at the rate of 7 1/2% up to and including August 31, 1972 and at % thereafter.

Finally, defendants seek to recover their costs pursuant to Rule 54(d), Fed. R. Civ. P. Recognizing that ordinarily plaintiffs, who recover a judgment, would, also, recover their costs, defendants appeal to the Court's discretion to award them costs.

Under Rule 54(d), the court has discretion in awarding costs. See Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964); McDonnell v. American Leduc Petroleums, Ltd., 456 F.2d 1170 (2d Cir. 1972). The Court, in the exercise

of its discretion, has determined that with the exception of defendants The Continental Corporation and The Continental Insurance Corporation ("the Continental companies"), each party should bear its own costs. The litigation was protracted, involving numerous claims and counter-claims. Except for the Continental companies, no party was completely successful. In light of all the facts and circumstances, costs are awarded the Continental companies. Each of the other parties shall bear its own costs.

Settle judgment on notice.

Dated: December 17, 1975

Robert J. Ward
U. S. D. J.

1158

Filed Jan 8 1976 09200 003

A-464
COUNTER-JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al.,

Plaintiffs,

- against -

THE DINERS' CLUB, INC., et al.,

Defendants,

- against -

WILLIAM D. FUGAZY, et ano.,

Third-Party Defendants.

CONSOLIDATED ACTION

FILE IN
70 Civ. 3064 (RJW)

72 Civ. 4324

WILLIAM D. FUGAZY, et ano.,

Plaintiffs,

- against -

THE DINERS' CLUB, INC., et al.,

Defendants,

- against -

MARX & CO., INC., et al.,

Additional Defendants on the Counterclaims.

COUNTER-JUDGMENT

76,015

MICROFILM JAN 8 1976

The issues in the above-entitled consolidated action having been brought on regularly for trial before the Court and a jury, Honorable Robert J. Ward, District Judge, presiding, and at the close of plaintiffs' case, the Court, on motion of defendants, having directed a verdict dismissing plaintiffs' claim for violation of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. 250.10b-5) with respect to the October 10, 1967 acquisition of Fugazy Travel Bureau, Inc.,

and having denied defendants' motion with respect to plaintiffs' other claims, and the Court, at the close of all the evidence, having denied plaintiffs' motion for a directed verdict with respect to defendants' counterclaims and having denied defendants' motion for a directed verdict with respect to defendants' counterclaims and plaintiffs' claims, and the Court having instructed the jury to find a special verdict, and the jury having duly rendered the following verdict:

(a) for defendants on plaintiffs' claim that defendants violated Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. 250.10b-5) with respect to the October 1, 1968 amendments to the employment agreements of plaintiffs Otto Marx, Jr., William D. Fugazy and Louis V. Fugazy;

(b) against defendant The Diners' Club, Inc., on plaintiffs' claim that defendant breached its contract to promptly file a registration statement for plaintiffs' restricted shares of Common Stock of The Diners' Club, Inc., and to use best efforts to cause said registration statement to become effective, in the sum of $44,000.00 for plaintiff John V. Summerlin; the sum of $240,000.00 for plaintiff Otto Marx, Jr.; the sum of $124,500.00 for plaintiff William D. Fugazy; and the sum of $124,500.00 for plaintiff Louis V. Fugazy; and

(c) for plaintiffs on defendants' counterclaims;

And the defendants having moved for judgment notwithstanding the verdict and for a new trial with respect to plaintiffs' breach of contract claim and defendants' counterclaims, and for

a remittitur of the damages awarded to plaintiffs, and the Court having denied said motion in all respects by memorandum of opinion and order dated September 23, 1975, officially reported at 400 F. Supp. 581 (S.D.N.Y. 1975), and the Court, on motion by plaintiffs, having held by memorandum opinion dated December 17, 1975 that plaintiffs are entitled to interest on the jury's award computed from September 2, 1969 at the annual rate of 7-1/2% up to and including August 31, 1972 and at the annual rate of 6% thereafter, and the Court in said memorandum opinion having held that defendants The Continental Corporation and The Continental Insurance Company should be awarded their costs in this action, and that all other parties should bear their own costs,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(a) that defendants have judgment on plaintiffs' claim for violation of Section 10(b) of the Securities Act of 1934 (15 U.S.C. §78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. 250. 10b-5) with respect to the October 10, 1967 acquisition of Fugazy Travel Bureau, Inc.;

(b) that defendants have judgment on plaintiffs' claim for violation of Section 10(b) of the Securities Act of 1934 (15 U.S.C. §78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. 250.10b-5) with respect to the October 1, 1968 amendments to the employment agreements of plaintiffs Otto Marx, Jr., William D. Fugazy and Louis V. Fugazy;

(c) that plaintiffs have judgment against defendant The Diners' Club, Inc., on plaintiffs'

claim that defendant breached its contract to promptly file a registration statement for plaintiffs restricted shares of Common Stock of The Diners' Club, Inc., and to use best efforts to cause said registration statement to become effective such that plaintiffs recover from The Diners' Club, Inc., the following amounts:

John V. Summerlin -- the sum of $44,000 with interest thereon at the annual rate of 7-1/2% from September 2, 1969 up to and including August 31, 1972, and 6% from September 1, 1972 up to and including May 28, 1975, the date of verdict, in the amount of $17,108.64, plus interest on the total sum awarded ($61,108.64) at the annual rate of 6% from May 28, 1975 up to and including the date of entry of final judgment;

Otto Marx, Jr. -- the sum of $240,000 with interest thereon at the annual rate of 7-1/2% from September 2, 1969 up to and including August 31, 1972, and 6% from September 1, 1972 up to and including May 28, 1975, the date of verdict, in the amount of $93,323.60, plus interest on the total sum awarded ($333,323.60) at the annual rate of 6% from May 28, 1975 up to and including the date of entry of final judgment;

William D. Fugazy -- the sum of $124,500 with interest thereon at the annual rate of 7-1/2% from September 2, 1969 up to and including August 31, 1972, and 6% from September 1, 1972 up

to and including May 28, 1975, the date of verdict, in the amount of $48,412.96, plus interest on the total sum awarded ($172,912.96) at the annual rate of 6% from May 28, 1975 up to and including the date of entry of final judgment;

Louis V. Fugazy -- the sum of $124,500 with interest thereon at the annual rate of 7-1/2% from September 2, 1969 up to and including August 31, 1972, and 6% from September 1, 1972 up to and including May 28, 1975, the date of verdict, in the amount of $48,412.96, plus interest on the total sum awarded ($172,912.96) at the annual rate of 6% from May 28, 1975 up to and including the date of entry of final judgment;

(d) that plaintiffs have judgment on each of defendants' counterclaims; and

(e) that defendants The Continental Insurance Company and The Continental Corporation have judgment jointly and severally against plaintiffs Otto Marx, Jr., John V. Summerlin, Marx & Co., Inc., William D. Fugazy and Louis V. Fugazy for said defendants' costs in this action; and ~~that said defendants have execution issued for the recovery of said costs,~~

(f) that each of the other parties bear its

own costs of this action.

Dated at New York, N.Y. , this R.J.W. 5TH DAY OF JANUARY, 1976.
~~21st day of December, 1975~~.

Robert J. Ward
Robert J. Ward
U.S.D.J.

JUDGMENT ENTERED — 1-6-76

Raymond F. Burghardt
Clerk

File Extra Copy

A-470

NOTICE OF APPEAL - FEBRUARY 4, 1976 Feb 4, 1976 54

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR., Plaintiffs -vs- THE DINERS' CLUB, INC., DINERS'/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION, and THE CONTINENTAL INSURANCE COMPANY, Defendants, -vs- WILLIAM D. FUGAZY and LOUIS V. FUGAZY, Third-Party Defendants.	70 Civ. 3064 (RJW) 72 Civ. 4324 NOTICE OF APPEAL
WILLIAM D. FUGAZY and LOUIS V. FUGAZY, Plaintiffs -vs- THE DINERS' CLUB, INC., DINERS'/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY, Defendants, MARX & CO., INC., OTTO MARX, JR., F.T. VENTURES, INC., and JOHN V. SUMMERLIN, JR., Additional Defendants on the Counterclaims.	

Notice is hereby given that the Diners' Club, Inc. and Diners'/Fugazy Travel, Inc. (now known as Diners' World Travel, Inc.), defendants above named, hereby appeal to the United States Court of Appeals

for the Second Circuit from the final judgment entered in this action on the 6th day of January, 1976.

Dated: New York, New York
February 4, 1976

HARDEE BAROVICK KONECKY & BRAUN

By: _____
Attorneys for All Defendants
One Dag Hammarskjold Plaza
New York, New York 10017
Tel.: 212 754-1430

TO:

HARRIS, FREDERICKS & KOROBKIN
1271 Avenue of the Americas
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OLWINE, CONNELLY, CHASE, O'DONNELL
& WEYHER
299 Park Avenue
New York, New York 10017

A-472

SUMMONS AND COMPLAINT

SUMMONS IN A CIVIL ACTION

CIV. 1a (2-64)
(Formerly D.C. Form No.45a Rev. (6-49))

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

JUDGE TYLER

72 CIV. 4324

CIVIL ACTION FILE NO. ——

WILLIAM D. FUGAZY and LOUIS V. FUGAZY

BEST COPY AVAILABLE

Plaintiffs

v.

THE DINERS CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION AND THE CONTINENTAL INSURANCE COMPANY,

Defendants.

SUMMONS

To the above named Defendants :

You are hereby summoned and required to serve upon STEIN & FREDERICKS, ESQS., plaintiff's attorney , whose address is 1776 Broadway, New York, N.Y. 10019

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

John Livingston
Clerk of Court.

EA Becker
Deputy Clerk.

Date: October 12, 1972

[Seal of Court]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM D. FUGAZY and LOUIS V. FUGAZY, Plaintiffs, -vs- THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC. THE CONTINENTAL CORPORATION, and THE CONTINENTAL INSURANCE COMPANY, Defendants.	COMPLAINT

Plaintiffs WILLIAM D. FUGAZY and LOUIS V. FUGAZY, by their attorneys Stein and Fredericks, in and for their complaint herein against the defendants THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION, and THE CONTINENTAL INSURANCE COMPANY, respectfully allege:

Jurisdiction

1. This action arises under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. Section 77aa, for violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78j(b), and Rule 10b-5 promulgated thereunder.

2. (a) Plaintiff William D. Fugazy (hereinafter sometimes referred to as "William") is an individual residing in the City, County and State of New York.

(b) Plaintiff Louis V. Fugazy (hereinafter sometimes referred to as "Louis") is an individual residing in the City, County and State of New York.

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COUNSELLORS AT LAW
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NEW YORK, NEW YORK 10019

3. (a) Defendant The Diners Club, Inc. (hereinafter sometimes referred to as "Diners") is a corporation organized and existing under the laws of the State of New York, which has its principal place of business in the City,County and State of New York.

(b) Defendant Diners/Fugazy Travel, Inc. (hereinafter sometimes referred to as "DFT") is a corporation organized and existing under the laws of the State of Delaware, which has its principal place of business in the City, County and State of New York. DFT is a wholly-owned subsidiary of Diners.

(c) Defendant The Continental Corporation (hereinafter sometimes referred to as "Continental") is a corporation organized and existing under the laws of the State of New York, which has its principal place of business in the City,County and State of New York.

(d) Defendant The Continental Insurance Company (hereinafter sometimes referred to as "Continental Insurance") is a corporation organized and existing under the laws of the State of New York, which has its principal place of business in the City, County and State of New York. Continental Insurance is a wholly-owned subsidiary of Continental.

IN AND FOR THEIR CAUSE OF ACTION AGAINST ALL DEFENDANTS

4. During the period from on or about July 1967 to February 6, 1970, Continental Insurance was in control of Diners and its directors and officers and exercised a controlling influence over the operations, management and policies of Diners and its subsidiaries. As of February 6, 1970, Continental Insurance owned 835,254 shares of Diners' Common Stock, par value $1 per share ("Common Stock"), or 34% of Diners' then outstanding Common Stock. In addition, at that time, Continental Insurance owned $18,750,000 principal amount of Convertible Debentures of

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Diners, convertible into a total of 424,430 shares of Diners' Common Stock, and 100,000 shares of $7 Cumulative Convertible Preferred Stock of Diners, convertible into a total of 650,406 shares of Diners' Common Stock.

5. On or about October 10, 1967, defendant Diners entered into an agreement (the "Purchase Agreement") with Fugazy Travel Bureau, Inc., a New York corporation (the name of which was changed to F T Ventures, Inc. ("Ventures"), a dissolved New York corporation) pursuant to which Fugazy Travel Bureau, Inc., a Delaware corporation, a wholly-owned subsidiary of defendant Diners (the name of which was changed to Diners/Fugazy Travel, Inc. ("DFT")) acquired, on or about October 30, 1967, substantially all of the assets of Ventures in exchange for 57,000 shares of Diners' Common Stock. Out of the total of 57,000 shares of Diners' Common Stock so acquired by Ventures, plus 1,710 shares paid with respect thereto in connection with the Diners' 3% stock dividend paid on June 14, 1968, the plaintiff William D. Fugazy and the plaintiff Louis V. Fugazy owned beneficially a total of 29,355 shares, divided equally between them, or 14,677.5 shares each. The closing price of the Diners' Common Stock on the New York Stock Exchange on October 30, 1967 was $36.625 per share.

6. Since October, 1967, defendant DFT has engaged in the business of providing travel and related services. Defendant DFT's retail travel agency business is conducted primarily through franchisees licensed by DFT to use its name and method of doing business.

7. (a) Effective October 30, 1967, plaintiff William D. Fugazy entered into an employment agreement ("Employment Agreement" for a term of three years with defendant

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DFT subject to renewal by it for additional terms up to ten years at a basic annual salary of $75,000 plus $25,000 per year for expenses and which provided, among other things, for percentage compensation to said plaintiff for a maximum period of 15 years at a rate of 10% of the initial franchise fees received by DFT, or 8-1/3% of the net profits of DFT, whichever was greater, subject to a $125,000 per fiscal year limitation and a $1,250,000 aggregate limitation.

(b) Effective October 30, 1967, plaintiff Louis V. Fugazy entered into an employment agreement ("Employment Agreement") for a term of three years with defendant DFT subject to renewal by it for additional terms up to ten years at a basic annual salary of $35,000 and which provided, among other things, for a percentage compensation to said plaintiff for a maximum period of 15 years at a rate of 10% of the initial franchise fees received by DFT, or 8-1/3% of the net profits of DFT, whichever was greater, subject to a $125,000 per fiscal year limitation and a $1,250,000 aggregate limitation.

8. On or about October 1, 1968, each plaintiff received 9,311 shares of Diners' Club Common Stock (or a total of 18,622 shares) in consideration of the elimination of the percentage compensation provisions from their respective Employment Agreements. The closing price of the Diners' Common Stock on the New York Stock Exchange on October 1, 1968 was $50.00 per share.

9. During the period from on or about July, 1967 to February 6, 1970, defendants unlawfully employed various devices, schemes and artifices to defraud the plaintiffs, knowingly made representations of material facts which were untrue and/or engaged in various acts, practices or a course of business which operated or would operate as a fraud or deceit upon plaintiffs, in connection with the purchase or sale

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and related transactions with respect to the Diners' Common Stock owned by plaintiffs.

10. The mails and other instrumentalities of interstate commerce were used in connection with the aforesaid unlawful employment of manipulative and deceptive devices.

11. The aforesaid unlawful employment of manipulative and deceptive devices in connection with the purchase or sale and related transactions with respect to the shares of Diners' Common Stock owned by plaintiffs was effectuated by various means and methods including, but not limited to, the following:

(a) At various times prior to October 10, 1967, and from time to time thereafter up to February 6, 1970, defendant Diners represented to plaintiffs that Diners would be acquired by Continental Insurance or Continental, and that, as a result thereof, the value of the Diners' Common Stock would be substantially increased;

(b) At various times during the period from October 10, 1967 to February 6, 1970, defendant DFT represented to plaintiffs that Diners would be acquired by Continental Insurance or Continental and that, as a result thereof, the value of the Diners' Common Stock would be substantially increased;

(c) At various times during the period from October 10, 1967 to February 6, 1970, defendant Continental Insurance represented to plaintiffs that Diners would be acquired by Continental Insurance or Continental and that, as a result thereof, the value of the Diners' Common Stock would be substantially increased;

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(d) At various times during the period from May, 1968 to February 6, 1970, defendant Continental represented to plaintiffs that Diners would be acquired by Continental or Continental Insurance and that, as a result thereof, the value of Diners' Common Stock would be substantially increased;

(e) At various times during the period from October 10, 1967 to February 6, 1970, defendants Continental Insurance and/or Continental, as controlling stockholders, directly or indirectly, of defendants Diners and DFT, unlawfully employed various devices, schemes and artifices and unlawfully engaged in a course of business designed to, directed toward and calculated to result in a substantial decrease in the net earnings of defendants Diners and DFT and the value of the Diners' Common Stock.

(f) At various times during the period from October 10, 1967 to February 6, 1970, defendant Continental Insurance, as controlling stockholder, directly or indirectly, of defendants Diners and DFT, unlawfully employed various devices, schemes and artifices and unlawfully engaged in a course of business designed to, directed toward and calculated to prevent or defer the acquisition of defendant Diners by defendant Continental Insurance, or defendant Continental, until such time as there had been a substantial decrease in the

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value of the Diners' Common stock and thereby increase upon such acquisition the controlling stock position of defendants Continental Insurance and Continental in defendant Diners at the expense and detriment of the plaintiffs.

(g) At various times during the period from May 1968 to February 6, 1970, defendant Continental, as controlling stockholder, directly or indirectly, of defendants Continental Insurance, Diners and DFT, unlawfully employed various devices, schemes and artifices and unlawfully engaged in a course of business designed to, directed toward and calculated to prevent or defer the acquisition of defendant Diners by defendant Continental Insurance, or defendant Continental, until such time as there had been a substantial decrease in the value of the Diners' Common Stock and thereby increase upon such acquisition the controlling stock position of defendants Continental Insurance and Continental in defendant Diners at the expense and detriment of the plaintiffs.

(h) In Section 10.2(b) of the Purchase Agreement, defendant Diners agreed as follows:

> "(b) If Diners shall not have filed and such registration statement subsequent to January 1, 1968 and before January 1, 1969, then, provided there are outstanding more than 25,000 shares bearing legend provided for in Section 10.1(c) hereof, the registered holders thereof (but not less than all of them) may thereafter at any time notify Diners that they desire that Diners file such a registration statement, but only with respect to all such shares then owned by all such holders. Unless Diners shall have received an opinion

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from its counsel that registration is not required, or if Diners and all such registered holders, together proceeding expeditiously and in good faith after such notice, cannot obtain from the Securities and Exchange Commission a "no-action" letter with respect to the sale of such shares, then Diners shall promptly file a registration statement and use its best efforts to cause such registration statement to become effective. Diners may include in such registration statement such other of its securities as it may desire. Anything to the contrary notwithstanding, Diners need not file a registration statement until it may lawfully use its regularly prepared fiscal year end financial statements, as a part of such registration statement. The notifying holders shall pay Diners in advance an amount sufficient to reimburse Diners for one-half of all registration fees, printing costs, auditing fees (but only in excess of normal fees paid by Diners for its fiscal year end audit), legal fees and all other incidental out-of-pocket expenses incurred in connection with such registration statement."

Pursuant to the foregoing provision of the Purchase Agreement, defendant Diners filed a Registration Statement (Form No. S-1) with the Securities and Exchange Commission on August 28, 1969, but failed and refused to use its best efforts to cause such Registration Statement to become effective.

12. The aforesaid representations made by the defendants were untrue statements of material fact and were known by them to be false when made. The aforesaid unlawful employment of manipulative and deceptive devices was made and employed by defendants for the purpose of inducing plaintiffs to acquire the shares of Diners' Common Stock, which the plaintiffs did acquire, and not to offer said shares for sale during the period from October 10, 1967 to February 6, 1970.

13. On or about December 1969, plaintiffs' beneficial interest in 29,355 shares of the Common Stock of Diners held by Ventures was sold at a price of $15.00 per share.

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Said sale caused loss to the plaintiffs in the sum of $1,027,425, or a loss to the plaintiff William in the sum of $513,712.50 and a loss to the plaintiff Louis in the sum of $513,712.50.

14. Pursuant to defendant Continental's offer dated February 6, 1970, as extended, to purchase Common Stock of Diners at $15.00 per share, plaintiffs William D. Fugazy and Louis V. Fugazy sold to Continental their 18,622 shares of Diners' Common Stock at $15.00 per share. Said sale caused loss to the plaintiffs in the sum of $651,770, or a loss to the plaintiff William in the sum of $325,885 and a loss to the plaintiff Louis in the sum of $325,885.

15. As a direct and proximate result of defendants' unlawful employment of manipulative and deceptive devices, the value of the Diners' Common Stock owned by plaintiffs was reduced by the sum of $1,679,195, all to the damage of each plaintiff of one-half that sum, or $839,597.50 each.

WHEREFORE, plaintiffs pray for judgment against all of the defendants as follows:

(a) Judgment in favor of plaintiffs William D. Fugazy and Louis J. Fugazy against all of the defendants, jointly and severally, in the amount of $1,679,195;

(b) Judgment in favor of plaintiff William D. Fugazy against all of the defendants, jointly and severally, in the amount of $839,597.50;

(c) Judgment in favor of plaintiff Louis V. Fugazy against all of the defendants, jointly and severally, in the amount of $839,597.50;

Together with interest and costs of this action, and such other, further and different relief as to this Court may appear just and proper.

STEIN AND FREDERICKS

By:_____
A member of the firm
Attorneys for the Plaintiffs
WILLIAM D. FUGAZY & LOUIS V. FUGAZY
Office & Post Office Address

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A-482
DEFENDANTS' ANSWER AND COUNTERCLAIMS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

WILLIAM D. FUGAZY and LOUIS V. FUGAZY, :

Plaintiffs, :

-against- :

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION AND THE CONTINENTAL INSURANCE COMPANY, :

Defendants. :

MARX & CO., INC., OTTO MARX, JR., F.T. VENTURES, INC., and JOHN V. SUMMERLIN, JR., :

Additional Defendants on the Counterclaims. :

- -x

72 Civ. 4324

KNAPP, J.

ANSWER AND COUNTERCLAIMS

Defendants, The Diners' Club, Inc., Diners' World Travel, Inc. (sued herein as Diners/Fugazy Travel, Inc.), The Continental Corporation and The Continental Insurance Company, by their attorneys, Hardee Barovick & Konecky, for their answer to the complaint herein:

1. With respect to Paragraph 1 of the complaint, admit that plaintiffs purport to bring this action pursuant to the statutes referred to in said paragraph, and except as expressly admitted herein, deny each and every remaining allegation contained therein.

2. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph 2 of the complaint.

3. Admit the allegations contained in Paragraph 3 of the complaint, except they state that the reference to Diners/Fugazy Travel, Inc. in Paragraph 3(b) of the complaint should be to Diners' World Travel, Inc. ("DWT").

4. With respect to Paragraph 4 of the complaint, admit that as of February 6, 1970, The Continental Insurance Company ("Continental Insurance") owned 835,254 shares of the Common Stock of Diners' Club, Inc. ("Diners"), par value $1 per share, or approximately 34% of Diners' then outstanding Common Stock and that Continental Insurance owned $18,750,000 principal amount of Convertible Debentures of Diners and 100,000 shares of $7 Cumulative Convertible Preferred Stock of Diners, and beg leave to refer to the agreements pursuant to which these Convertible Debentures and the Convertible Preferred Stock were acquired for a true and correct statement of the convertibility rights thereunder, and except as expressly admitted herein, deny each and every remaining allegation contained therein.

5. With respect to Paragraph 5 of the complaint, admit that an agreement was entered into between Diners and Fugazy Travel Bureau, Inc., (later renamed and hereafter referred to as F.T. Ventures, Inc. ("Ventures")), on or about October 10, 1967, and beg leave to refer to said agreement for the true and correct contents thereof, and admit that the closing price of Diners' Common Stock on October 30, 1967 was $36.625, and except as expressly admitted herein, deny each and every remaining allegation contained therein.

6. Deny each and every allegation contained in Paragraph 6 of the complaint.

7. With respect to Paragraphs 7 and 8 of the complaint, admit that agreements were entered into between DWT and the plaintiffs in October of 1967, and beg leave to refer to said agreements and amendments thereto for the true and correct contents thereof, and except as expressly admitted herein, deny each and every remaining allegation contained therein.

8. Deny each and every allegation contained in Paragraphs 9, 10, 11, 11(a) through 11 (g), 12, 13 and 15 of the complaint.

9. With respect to Paragraph 11(h) of the complaint, admit that Diners filed a Registration Statement (Form S-1) with the Securities and Exchange Commission on August 28, 1969, pursuant to the provisions of the Purchase Agreement, and beg leave to refer to the entirety of said Purchase Agreement for the true and correct contents thereof, and except as expressly admitted herein, deny each and every remaining allegation contained therein.

10. With respect to Paragraph 14 of the complaint, admit that defendant, Continental Corporation, extended a tender offer dated February 6, 1970, to purchase Common Stock of Diners at $15 per share, and except as expressly admitted herein, deny each and every remaining allegation contained therein.

AS AND FOR A FIRST COMPLETE AFFIRMATIVE DEFENSE

11. The Complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND COMPLETE AFFIRMATIVE DEFENSE

12. Plaintiffs have no standing to sue in this action as they were neither purchasers nor sellers of the shares of Diners' Common Stock upon which the action herein is based.

AS AND FOR A THIRD COMPLETE AFFIRMATIVE DEFENSE

13. In order to induce defendants Diners and DWT to enter into the purchase and employment agreements, and amendments thereto, alluded to in Paragraphs 5, 7 and 8 of the complaint, the plaintiffs knowingly made material misrepresentations and omissions of material facts concerning, inter alia,

(a) the viability of the travel agency franchise system as conceived by the plaintiffs;

(b) the projection of future earnings from this franchise system;

(c) the projected costs and expenses of operating this franchise system;

(d) the financial condition of Ventures;

(e) the operability and success of former and existing franchises;

(f) the techniques utilized to sell franchises; and

(g) the administrative and managerial capabilities of the plaintiffs in their capacities as employees of and consultants to the franchise system.

14. The statements and representations, and omissions of material facts, were made falsely and fraudulently by the plaintiffs and were known by them to be false and fraudulent when made.

15. In truth and in fact, the plaintiffs knew that their concept for a travel agency franchise system was completely unworkable. The potential future earnings of the franchise system were negative. The actual costs and expenses of operating the franchise system were greatly in excess of the projected costs and expenses. Ventures was not operating at a profit. The existing franchises were notably unworkable and unsuccessful. Improper and fraudulent techniques were used to sell franchises. The plaintiffs' capacities to supervise and assist in the operation of the franchise system were far below what they had represented them to be. The plaintiffs could make no beneficial contribution toward the operation of a workable and profitable franchise system, and indeed were the very cause of its inability to operate successfully.

16. Defendants, Diners and DWT, believed such statements and representations to be true and were induced thereby to enter into the aforesaid purchase and employment agreements, and amendments thereto, and would not have entered into said agreements and amendments had they known the truth with regard to such statements and representations.

17. As a result of such conduct, plaintiffs are precluded from any recovery thereunder.

AS AND FOR A FOURTH COMPLETE AFFIRMATIVE DEFENSE

18. Repeat and reallege each and every allegation contained in Paragraphs 13 through 16 above, as if fully set forth herein.

19. During the periods of time referred to in the

complaint, plaintiffs were in confidential and fiduciary capacities and positions of trust vis-a-vis Diners and DWT. During these periods plaintiffs breached their confidential and fiduciary relationships and positions of trust with Diners and DWT by self-dealing and committing other improper, fraudulent and illegal acts and omissions for their own benefit.

20. Each and every cause of action set forth in the complaint if any, was a direct result of the aforesaid improper, fraudulent and illegal acts and omissions on the part of the plaintiffs, and plaintiffs are thereby precluded from any recovery thereunder.

AS AND FOR A FIFTH COMPLETE AFFIRMATIVE DEFENSE

21. The right of action set forth in the complaint accrued prior to the period prescribed by the applicable statute of limitations, and is therefore barred.

AS AND FOR A SIXTH COMPLETE AFFIRMATIVE DEFENSE

22. Plaintiffs had complete knowledge of all the events alleged in the complaint at least as early as the dates therein specified, October 1967 to February 1970. In addition, from in or before July 1970, plaintiffs had complete knowledge of an identical action commenced by persons similarly situated against the instant defendants (Marx & Co., Inc., et al. v. Diners' Club, Inc., et al., 70 Civ. 3064).

23. Notwithstanding such full and complete knowledge, plaintiffs inexcusably refrained from commencing the instant action until October 12, 1972, with resulting prejudice to defendants. The plaintiffs have thereby been guilty of such

laches as should in equity bar and estop them from maintaining this action.

AS AND FOR A SEVENTH PARTIAL AFFIRMATIVE DEFENSE

24. The Securities and Exchange Commission refused to permit the Registration Statement, referred to in Paragraph 11(h) of the complaint, to become effective because of its objection to certain accounting procedures which the plaintiffs themselves had put into effect with respect to the earnings statements and balance sheets of DWT. The plaintiffs are thereby precluded from basing any portion of their claim on the failure of said Registration Statement to have become effective.

AS AND FOR A FIRST COUNTERCLAIM BY DEFENDANTS DINERS AND DWT AGAINST PLAINTIFFS AND COUNTERCLAIM DEFENDANTS

25. This cause of action arises under Section 10(b) of the Securities Exchange Act of 1934 ("Act of 1934"), 15 U.S.C. §78j(b) and Rule 10b-5 promulgated pursuant thereto, and the jurisdiction of this Court is invoked pursuant to Section 27 of the Act of 1934, 15 U.S.C. §78aa.

26. At all times hereinafter mentioned, defendant and counterclaimant Diners was and still is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the County, City and State of New York.

27. At all times hereinafter mentioned, defendant and counterclaimant, DWT, was and still is a corporation organized and existing under the laws of the State of Delaware with its

principal place of business in the County, City and State of New York, and was and still is a wholly-owned subsidiary of Diners.

28. Upon information and belief, counterclaim defendant Ventures (formerly known as Fugazy Travel Bureau, Inc.) at all times mentioned herein was and still is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the County, City and State of New York.

29. Upon information and belief, counterclaim defendant, Marx & Co., Inc. ("Marx & Co."), at all times mentioned herein was and still is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the County, City and State of New York.

30. Upon information and belief, Marx & Co. at all times mentioned herein was and still is the controlling stockholder of Ventures.

31. Upon information and belief, counterclaim defendant, Otto Marx, Jr. ("Otto Marx") is an individual residing in the County, City and State of New York and at all times herein mentioned was and still is the controlling stockholder and president of Marx & Co., and was the Chairman of the Board of Ventures and a director and a consultant in the employ of DWT.

32. Upon information and belief, counterclaim defendant, John V. Summerlin, Jr. ("Summerlin") is an individual residing in the County, City and State of New York and at all times hereinafter mentioned was and still is an officer and part

owner of Marx & Co. and was an officer, director and part owner of Ventures.

33. Upon information and belief, plaintiff and counterclaim defendant William Fugazy is an individual residing in the City, County and State of New York, and at all times hereinafter mentioned he was a director of Diners, the president of Diners from in or about April, 1968 to in or about February, 1969 and the president and a director of DWT.

34. Upon information and belief, plaintiff and counterclaim defendant Louis Fugazy is an individual residing in the City, County and State of New York, and at all time hereinafter mentioned he was an employee of DWT.

35. On or about October 10, 1967, Diners and Ventures entered into an agreement (hereinafter "Purchase Agreement", which Agreement we beg leave to refer to for the true and complete contents thereof), pursuant to which Diners purchase substantially all the assets of Ventures on or about October 30, 1967 in exchange for 57,000 shares of Common Stock of Diners and $2,716,997 in cash. The assets so acquired by Diners were then transferred to DWT, a wholly-owned subsidiary of Diners.

36. In connection with the Purchase Agreement, on or about October 30, 1967, Diners entered into employment agreements with the three principal officers of Ventures, William Fugazy, Louis Fugazy and Otto Marx, which Agreements we beg leave to refer to for the true and complete contents thereof.

37. The employment agreement with William Fugazy

provided, among other things, for a salary to be paid to him by DWT in the yearly amount of $75,000, plus $25,000 for expenses, plus the greater of 10% of the initial fees from franchise sales by DWT or 8-1/3% of the net profits of DWT, for a period of up to 15 years.

38. The employment agreement with Louis Fugazy provided, among other things, for a salary to be paid to him by DWT in the yearly amount of $35,000, plus the greater of 10% of the initial fees from franchise sales by DWT or 8-1/3% of the net profits of DWT, for a period of up to 15 years.

39. The employment agreement with Otto Marx provided, among other things, for a salary to be paid to him as a consultant in the yearly amount of $6,000, plus the greater of 20% of the initial fees from franchise sales by DWT or 16-2/3% of the net profits of DWT, for a period of up to 15 years.

40. On or about October 1, 1968, amendments to these employment agreements were entered into, for the true and correct contents of which we respectfully request leave to refer, pursuant to which, inter alia, the percentage compensation provisions were eliminated and William Fugazy and Louis Fugazy each received from Diners 9,311 shares of its Common Stock and $60,937.50 in cash, and Otto Marx received from Diners 18,623 shares of its Common Stock and $121,875 in cash.

41. From in or about April of 1967 through 1969, the plaintiffs and counterclaim defendants, acting individually and in their representative capacities, knowingly made material

misrepresentations and omissions of material facts concerning, inter alia,

(a) the viability of the travel agency franchise system as conceived by them;

(b) the projection of future earnings from this franchise system;

(c) the projected costs and expenses of operating this franchise system;

(d) the financial condition of Fugazy Travel Bureau, Inc. (later F.T. Ventures, Inc.);

(e) the operability and success of former and existing franchises;

(f) the techniques utilized to sell franchises; and

(g) the knowledge, expertise and administrative capabilities of William Fugazy, Louis Fugazy and Otto Marx in their capacities as officers, directors and employees of and consultants to the franchise system,

all with the intent to deceive and defraud Diners and DWT and to induce these defendants to issue the aforementioned shares of stock of Diners, to purchase the assets of Ventures, to enter into the Purchase Agreement, to enter into the Employment Agreements and amendments thereto, to continue to operate the franchise system under the methods theretofore used by the plaintiffs and counterclaim defendants, and to retain the aforementioned individuals as officers, directors, employees and consultants.

42. Diners and DWT relied on the aforementioned misrepresentations and omissions when entering into each of the agreements referred to in Paragraphs 35 through 40 above and

would not have entered into said agreements except for the aforementioned misrepresentations and omissions.

43. The mails and other instrumentalities of interstate commerce were used in connection with the aforementioned unlawful conduct.

44. As a result of plaintiffs' and counterclaim defendants' unlawful, fraudulent and manipulative conduct, Diners and DWT have sustained damages in a substantial amount which cannot be ascertained at the present time, but which Diners and DWT believe to be substantially in excess of $30,000,000.

AS AND FOR A SECOND COUNTERCLAIM BY DINERS AND DWT AGAINST PLAINTIFFS AND COUNTERCLAIM DEFENDANT OTTO MARX

45. Repeat and reallege each and every allegation contained in Paragraphs 26 through 42 above, as if fully set forth herein.

46. The jurisdiction of this Court is invoked pursuant to the principles of pendent jurisdiction.

47. The aforesaid and other unlawful conduct of the plaintiffs and counterclaim defendant Otto Marx, including self-dealing, constituted a material breach of the fiduciary duties and obligations of confidence and trust owed to Diners and DWT in their respective capacities as consultants to, officers, employees and directors of Diners and DWT, all to the detriment of Diners and DWT.

48. As a result of plaintiffs' and counterclaim defendant Otto Marx's breach of their fiduciary duties and positions of confidence and trust, Diners and DWT have sustained damages in a substantial amount which cannot be ascertained at the present time, but which Diners and DWT believe to be substantially in excess of $30,000,000.

AS AND FOR A THIRD COUNTERCLAIM BY DINERS AND DWT AGAINST PLAINTIFFS AND COUNTERCLAIM DEFENDANTS

49. Repeat and reallege each and every allegation contained in Paragraphs 26 through 42, 46 and 47 above, as if fully set forth herein.

50. The Purchase Agreement at §2.21 provided:

> "Disclosure. No representation or warranty by Fugazy [i.e., Ventures] in this Agreement or in any Schedule or certificate or other document furnished or to be furnished to Diners pursuant hereto, or in connection with the transactions contemplated hereby, contains or will contain any untrue statement of a material fact, or omits or will omit to state a material fact required to be stated therein or necessary to make the statements contained therein not misleading or necessary in order to provide a prospective purchaser of the business of Fugazy and its Subsidiaries with proper information as to the business and affairs of Fugazy and its Subsidiaries."

51. Plaintiffs and counterclaim defendants breached this and other provisions of the Purchase Agreement in that they knowingly misrepresented material facts and omitted to state material facts which were necessary to provide a prospective purchaser of the business of Ventures with proper information as to the business and affairs of Ventures, including, inter alia:

> i) The financial statements of Ventures were not prepared in accordance with generally accepted accounting principles consistently applied and did not present a fair and accurate picture of Ventures' consolidated financial position as warranted in Paragraphs 2.4 and 2.21 of the Purchase Agreement;

ii) Accounts receivable were not collectible and established reserves were not sufficient as warranted in Paragraphs 2.6 and 2.21 of the Purchase Agreement; and

iii) Ventures had entered into contracts not in the ordinary course of business in contravention of Paragraphs 2.10, 2.16 and 2.21 of the Purchase Agreement.

52. As a result of plaintiffs' and counterclaim defendants' material breach of the Purchase Agreement, Diners and DWT sustained damages in a substantial amount which cannot be ascertained at the present time, but which Diners and DWT believe to be substantially in excess of $30,000,000.

WHEREFORE, defendants respectfully demand:

a) That judgment on behalf of each defendant be entered dismissing the complaint as against each plaintiff.

b) That defendants Diners and DWT have judgment on their first counterclaim jointly and severally against plaintiffs and counterclaim defendants in an amount which Diners and DWT believe to be in excess of $30,000,000.

c) That defendants Diners and DWT have judgment on their second counterclaim jointly and severally against plaintiffs and counterclaim defendant Otto Marx in amount which Diners and DWT believe to be in excess of $30,000,000.

d) That defendants Diners and DWT have judgment on their third counterclaim jointly and severally against plaintiffs and counterclaim defendants in an amount which Diners and DWT believe to be in excess of $30,000,000.

e) That the defendants have their costs and disbursements in this action.

f) Such other, further or different relief as may be just and proper.

Dated: New York, New York
January 12, 1973

HARDEE BAROVICK & KONECKY

By _____
A Member of the Firm

Attorneys for Defendants
300 Park Avenue
New York, New York 10022
Telephone No. (212) 421-1144

A-497

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROBERT B. McKAY , being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 86-75 Midland Parkway, Jamaica Estates, N.Y. 11432

That on the 12th day of January , 1973 deponent served the annexed paper upon Robinson, Silverman, Pearce, Aronsohn & Sand, Esqs., 230 Park Ave., New York, N.Y. 10017 and Harris & Fredericks, Esqs., 1271 Avenue of the Americas, NYC 10020, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Robert B. McKay

Sworn to before me this

12th day of January , 1973

Peter Bienstock

Notary Public

PETER BIENSTOCK
Notary Public, State of New York
No. 51-[illegible]
Qualified in New York County
Commission Expires March 30, 1974

PLAINTIFFS' ANSWER TO COUNTERCLAIMS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION AND THE CONTINENTAL INSURANCE COMPANY,

Defendants.

MARX & CO., INC., OTTO MARX, JR., F. T. VENTURES, INC., and JOHN V. SUMMERLIN, JR.,

Additional Defendants on the Counterclaims.

- -X

72 Civ. 4324

KNAPP, J.

ANSWER

Plaintiffs, by and through their attorneys, Harris & Fredericks, in and for their answer to the defendants' counterclaims, respectfully allege as follows:

AS ANSWER TO THE FIRST COUNTERCLAIM

1. Deny information sufficient to form a belief as to the allegations set forth in paragraphs 25, 26 and 27 of defendants' answer.

2. Admit each and every allegation as set forth in paragraph 28 of the defendants' answer.

3. Deny information sufficient to form a belief as to the allegations in paragraphs 29, 30, 31 and 32 of defendants' answer.

4. Admit each and every allegation as set forth in paragraphs 33, 34, 35, 36, 37, 38, 39 and 40 of the defendants' answer.

5. Deny each and every allegation set forth in paragraphs 41, 42, 43 and 44 of defendants' answer.

AS ANSWER TO THE SECOND COUNTERCLAIM

6. Repeats and realleges each and every allegation heretofore set forth in paragraphs 1 through 5, inclusive, with the same force and effect as if more fully set forth herein.

7. Deny information sufficient to form a belief as to the allegations set forth in paragraph 46 of the defendants' answer.

8. Deny each and every allegation set forth in paragraphs 47 and 48 of defendants' answer.

AS ANSWER TO THE THIRD COUNTERCLAIM

9. Repeats and realleges each and every allegation heretofore set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, and 8, inclusive, with the same force and effect as if more fully set forth herein.

10. Admit each and every allegation as set forth in paragraph 50 of the defendants' answer.

11. Deny each and every allegation set forth in paragraphs 51 and 52 of defendants' answer.

HARRIS & FREDERICKS
Attorneys for Plaintiffs

By: _____

1271 Avenue of the Americas
New York, New York 10020
Telephone No. (212) 489-1504

A-500
ADDITIONAL DEFENDANTS' ANSWER TO COUNTERCLAIMS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants.

MARX & CO., INC., OTTO MARX, JR., F.T. VENTURES, INC., and JOHN V. SUMMERLIN, JR.,

Additional Defendants on the Counterclaims

- -x

72 Civ. 4324

KNAPP, J.

ANSWER

Additional Defendants on the Counterclaims, MARX & CO., INC., OTTO MARX, JR., F.T. VENTURES, INC., and JOHN V. SUMMERLIN, JR., by and through their attorneys, Specks and Goldberg and Robinson, Silverman, Pearce, Aronsohn, Sand & Berman, as and for their answer to the defendants' counterclaims, allege as follows:

AS ANSWER TO THE FIRST COUNTERCLAIM

1. Deny the allegations of paragraphs "25", "41", "42", "43", and "44" of defendants' answer.

2. Lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "26", "27", "33", "34", "37" and "38" of defendants' answer.

3. Lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "40" of defendants' answer, except admit that Otto Marx, Jr., received 18,623 shares of the Common Stock Diners' and $121,875.

4. Deny the allegations of paragraph "28" of defendants' answer, except admit that F.T. Ventures, Inc., was a corporation organized and existing under the laws of the State of New York, which had its principal place of business in the County, City and State of New York.

5. Deny the allegations of paragraph "30" of the defendants' answer, except admit that Marx & Co., Inc. was a substantial stockholder of F.T. Ventures, Inc.

6. Deny the allegations of paragraph "31" of the defendants' answer, except admit that Otto Marx, Jr., resides in the County, City and State of New York, and was and is a controlling stockholder and president of Marx & Co., Inc., and was chairman of the board of F.T. Ventures, Inc.

7. Deny the allegations of paragraph "32" of defendants' answer, except admit that John V. Summerlin, Jr., resides in the County, City and State of New York, and was an officer of Marx & Co., Inc., and an officer and director of F.T. Ventures, Inc.

8. Admit the allegations of paragraphs "29", "35", "36" and "39" of defendants' answer.

AS ANSWER TO THE SECOND COUNTERCLAIM

9. Repeat and reallege each and every allegation heretofore set forth in paragraphs "1" through "8", with the same force

and effect as if more fully set forth herein.

10. Deny the allegations of paragraphs "46", "47" and "48" of defendants' answer.

AS ANSWER TO THE THIRD COUNTERCLAIM

11. Repeat and reallege each and every allegation heretofore set forth in paragraphs "1" through "10", with the same force and effect as if more fully set forth herein.

12. Deny the allegations of paragraphs "51" and "52" of defendants' answer.

WHEREFORE, the additional defendants on counterclaims, MARX & CO., INC., OTTO MARX, JR., F.T. VENTURES, INC., and JOHN V. SUMMERLIN, JR., demand that the counterclaims be dismissed as against them, together with cost and disbursements of this action.

ROBINSON, SILVERMAN, PEARCE
ARONSOHN, SAND & BERMAN

By /s/ Norman A. Olshan
A Member of the Firm
Attorneys for Additional Defendants
on Counterclaims
Address: 230 Park Avenue
New York, New York 10017
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and

SPECKS & GOLDBERG
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NOTICE OF CROSS APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR., Plaintiffs,	:	70 Civ. 3064
-against-	:	
THE DINERS' CLUB, INC., DINERS'/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION, and THE CONTINENTAL INSURANCE COMPANY, Defendants,	:	72 Civ. 4324 (RJW)
-against-	:	NOTICE OF CROSS APPEAL
WILLIAM D. FUGAZY and LOUIS V. FUGAZY, Third-Party Defendants.	:	
WILLIAM D. FUGAZY and LOUIS V. FUGAZY, Plaintiffs,	:	
-against-	:	
THE DINERS' CLUB, INC., DINERS'/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY, Defendants,	:	
-against-	:	
MARX & CO., INC., OTTO MARX, JR., F. T. VENTURES, INC., and JOHN V. SUMMERLIN, JR., Additional Defendants on the Counterclaims.	:	

Notice is hereby given that Marx & Co., Inc.,

Otto Marx, Jr., John V. Summerlin, Jr., William D. Fugazy and Louis V. Fugazy, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the order during trial directing a verdict dismissing plaintiffs' claim for violation of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and Rule 10b-5 promulgated thereunder (17 C.F.R. 250.10b-5) with respect to the October 10, 1967 acquisition of Fugazy Travel Bureau, Inc., set forth in the final judgment entered in this action on the 6th day of January, 1976.

New York, New York
February 17, 1976

HARRIS, FREDERICKS & KOROBKIN

By_____
A Member of the Firm
Attorneys for Plaintiffs
1271 Avenue of the Americas
New York, New York 10019
(212) 489-1504

OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
299 Park Avenue
New York, New York 10017
of Counsel

TO:

HARDEE BAROVICK KONECKY
& BRAUN
One Dag Hammarskjold Plaza
New York, New York 10017

72 Civ. 4324 (RJW)
INDEX NO. 70 Civ. 3064

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARX & CO., INC., et al.,
Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,
Defendants,

-against-

WILLIAM D. FUGAZY, et ano.,
Third-Party Defendants.

WILLIAM D. FUGAZY, et ano.,
Plaintiffs,

-against-

THE DINERS' CLUB, INC., et al.,
Defendants,

-against-

MARX & CO., INC., et al.,
Additional Defendants
on the Counterclaims.

NOTICE OF CROSS APPEAL

Olwine, Connelly, Chase, O'Donnell & Weyher

Attorneys for Plaintiffs

299 PARK AVENUE
NEW YORK, N. Y. 10017
688-0400

A-506

CIVIL APPEAL SCHEDULING ORDER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR.,

Plaintiffs-Appellees,

- against -

THE DINERS CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION, and THE CONTINENTAL INSURANCE COMPANY,

Defendants,

THE DINERS CLUB, INC., DINERS/FUGAZY TRAVEL, INC.,

Defendants-Appellants,

OTTO MARX, JR., JOHN V. SUMMERLIN, JR., WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs-Cross Appellants-Appellees.

CIVIL APPEAL SCHEDULING ORDER #2

Docket No. 76-7050

UNITED STATES COURT OF APPEALS
FILED
MAR 22 1976
SECOND CIRCUIT

Noting that Hardee Barovick Konecky & Braun, Esqs., counsel for the appellants Diners Club and Diners/Fugazy Travel, Inc., and that Harris Fredericks & Korobkin, and Olwine Connelly Chase O'Donnell & Weyher, counsel for cross-appellants, Otto Marx, Jr., John V. Summerlin Jr., William D. Fugazy and Louis V. Fugazy, have filed a Notice of Appeal, a Notice of Cross-Appeal, Civil Appeal Pre-Argument Statements and Transcript Information, and being advised as to the progress of the appeal,

IT IS HEREBY ORDERED that the record on appeal be filed on or before April 15, 1976

IT IS FURTHER ORDERED that the appellants' brief and the joint appendix be filed on or before May 17, 1976.

IT IS FURTHER ORDERED that the brief of the cross-appellants and appellees be filed on or before June 18, 1976

IT IS FURTHER ORDERED that the appellants' reply brief be filed on or before July 9, 1976

IT IS FURTHER ORDERED that the reply brief of the cross-appellants and appellees be filed on or before July 23, 1976

IT IS FURTHER ORDERED that the argument of the appeal be ready to be heard during the week of August 16, 1976

IT IS FURTHER ORDERED that in the event of a default by appellants in filing the record on appeal or the appellants' brief and the appendix by the time directed or upon default of the appellants regarding any other provision of this order, the appeal shall be dismissed forthwith, or upon default of the cross-appellants regarding any provision of this order, the cross-appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that if the appellees fail to file a brief within the time directed by this order, such appellees shall be subject to such sanctions as the court may deem appropriate.

A. DANIEL FUSARO
Clerk

By Nathaniel Fensterstock
Nathaniel Fensterstock
Staff Counsel

Dated: March 22, 1976

TI EXH 4

A-508
PLAINTIFFS' EXHIBIT 4

MEMORANDUM OF INTENTION

Subject to the approval of their respective boards of Directors, The Diners' Club, Inc., a New York corporation ("DINERS") proposes to acquire, through a new wholly-owned subsidiary to be organized (hereinafter called the "Diners subsidiary"), and Fugazy Travel Bureau, Inc., a New York corporation (hereinafter called "Fugazy"), proposes to transfer to the Diners subsidiary, all of the business and assets of Fugazy on the following terms:

1. Diners shall purchase the accounts and notes receivable and certain other assets of Fugazy for cash in the amount of the net realizable value of such accounts and notes, the original cost of the fixed assets (approximately $275,000) and the book value of the other assets on the closing date. The collection of the accounts and notes receivable shall be fully guaranteed by Fugazy.

Diners shall purchase the balance of the assets of Fugazy for a price of 62,000 shares of Diners' common stock delivered to Fugazy at the closing, and

Fugazy and/or its stockholders and affiliates will agree to provide to the Diners' subsidiary such services and the use of such property and property rights and covenants as the parties shall determine are necessary or useful to the conduct of the business by the Diners' subsidiary, for aggregate payments of not more than $5,020,000, reflecting a cost to Diners of approximately $2,500,000 after federal income taxes.

2. Until the closing date, Fugazy (a) will conduct its business as usual, except that it will not make any sales of franchises without Diners' prior written approval, (b) will not (without Diners' prior written approval or written statement of no objection) engage in any transactions outside the ordinary course of business, (c) will not issue or sell any stock (except pursuant to options, if any, outstanding at the date hereof) or any options or make any other change in capitalization, and (d) will not pay any dividends or make any other distributions on its outstanding stock.

3. Diners and Fugazy will promptly proceed to work out a mutually satisfactory agreement providing in detail for the transaction. Such agreement will include terms and conditions customary under the circumstances, including conditions that:

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(a) Diners shall have received consolidated financial statements of Fugazy and its consolidated subsidiaries as at September 30, 1966 and for the fiscal year then ended, audited and certified by J. K. Lasser & Company, which shall show among other things net earnings before federal income taxes for such fiscal year of not less than $400,000;

(b) Diners shall have received consolidated financial statements of Fugazy and its consolidated subsidiaries as at June 30, 1967 and for the 9 months then ended, audited and certified by independent public accountants acceptable to Diners after examinations of a scope approved by Diners;

(c) Fugazy shall have obtained all necessary and appropriate approvals of IATA, ATC, and Fugazy's stockholders with respect to the transaction;

(d) Examination and review of Fugazy and its subsidiaries by auditors, legal counsel and others representing Diners shall not have disclosed prior to the closing date any material adverse change in the status of the business, properties, financial condition, earnings or pending litigation

of Fugazy and any of such subsidiaries from that represented by Fugazy to Diners or as shown by the financial statements referred to in subparagraphs (a) and (b) above; and

(e) No action or proceeding before a court or other governmental body or agency shall have been instituted or threatened to restrain or prohibit the consummation of the transaction.

4. Fugazy will agree to deliver to Diners at the closing a release by A. Mitchell Liftig from any claim by him for any fee, commission or other compensation in connection with the transactions contemplated hereby, whether as broker, finder or otherwise.

5. It is understood that, while the foregoing represents the present intention of the parties, neither party shall be bound to the other until the above-mentioned agreement has been prepared, executed and delivered.

July 20, 1967

THE DINERS' CLUB, INC.

By /s/ TAH

FUGAZY TRAVEL BUREAU, INC.

By /s/ [illegible]

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July 20, 1967

Fugazy Travel Bureau, Inc.
488 Madison Avenue
New York, New York

Dear Sir:

In connection with the Memorandum of Intention executed today between our two companies, please be advised that it is our further understanding as follows:

1. The periodic payments referred to in the second paragraph of paragraph one of the Memorandum would be made by us in amounts no less than 40% of the fees received from time to time for the sale of franchises, or 1/3 of the net profits of the new Diners subsidiary, whichever is higher, until the amount referred to in the second paragraph of paragraph one of the Memorandum has been fully paid.

2. The price at which franchises shall be offered for sale by the new Diners subsidiary shall be subject to the approval of William D. Fugazy, until such time as the amount referred to in the second paragraph of paragraph one of the Memorandum has been fully paid.

If the foregoing accords with your understanding, please execute and return the enclosed copy of this letter.

Very truly yours,

THE DINERS' CLUB, INC.

By: S/ Thomas Hays
Executive Vice President

AGREED TO: FUGAZY TRAVEL BUREAU, INC.

By: S/Otto W. Marx